

Daniel A. Garcia, Esq.
(724) 838-6416
(234) 678-2310 (Fax)

February 15, 2023

VIA ELECTRONIC FILING

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

Re: Rich Bailey v. West Penn Power Company
Docket No. C-2023-3037788

Dear Secretary Chiavetta:

Enclosed please find the Preliminary Objection of West Penn Power Company to the Formal Complaint of Rich Bailey, to be filed 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 regarding this matter.

Very truly yours,



Dan Garcia (ID # 311503)
FirstEnergy Service Company

DAG/mlr

Enclosures

cc: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Rich Bailey,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2023-3037788
	:	
West Penn Power Company,	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.101, YOU MAY ANSWER THE ENCLOSED PRELIMINARY OBJECTION WITHIN TEN (10) DAYS OF THE DATE OF SERVICE HEREOF. YOUR ANSWER TO THE PRELIMINARY OBJECTION MUST BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL FOR WEST PENN POWER CORPORATION.

Dated: February 15, 2023



Daniel A. Garcia (ID # 311503)
FirstEnergy Service Company
800 Cabin Hill Drive
Greensburg, PA 15601
Phone: 724-838-6416
E-mail: dagarcia@firstenergycorp.com

Tori L. Giesler (ID # 207742)
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001
Phone: 610-921-6658
E-mail: tgiesler@firstenergycorp.com

Attorneys for West Penn Power Company

**BEFORE THE
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**PRELIMINARY OBJECTION OF
WEST PENN POWER COMPANY TO THE
COMPLAINT OF RICH BAILEY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, comes West Penn Power Company (“West Penn” or the “Company”) and hereby files this Preliminary Objection, pursuant to the regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.101, and respectfully requests that the Commission dismiss the above-captioned Formal Complaint (“Complaint”) filed by Rich Bailey (“Complainant”) in its entirety and with prejudice.

The instant Complaint challenges West Penn’s installation of a smart meter at the Complainant’s address at 594 Bartleyville Road, Burgettstown, PA 15021 (“Service Address”). As relief, the Complainant requests that the Company replace the existing smart meter at his Service Address with an “analog meter.”

As explained herein, the Commission should summarily dismiss the Complaint because the Complaint’s requested relief cannot be granted as customers of West Penn are not permitted to opt-out of or rescind smart meter installation.

In support thereof, West Penn states as follows:

I. BACKGROUND

1. West Penn is a “public utility” and an “electric distribution company” as those terms are defined under the Public Utility Code, 66 Pa.C.S. §§ 102 and 2803, subject to the regulatory jurisdiction of the Commission.

2. On January 25, 2023, West Penn was served with the above-captioned Complaint, which challenges the Company’s retainment of a smart meter at the Service Address.¹

3. West Penn herein files this Preliminary Objection to the Complaint. For the reasons explained below, West Penn respectfully requests that the Commission summarily dismiss the Complaint because the Complaint’s requested relief cannot be granted by the Commission and, therefore, is legally insufficient.

II. STANDARD OF REVIEW

4. Pursuant to the Commission’s regulations, preliminary objections in response to a pleading may be filed on several grounds, including:

- (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.

52 Pa. Code § 5.101(a) (emphasis added).

¹ The Company installed a smart meter at the Service Address on December 13, 2017

5. In ruling on preliminary objections, the Presiding Officer must accept as true all well-pled allegations of material facts as well as all inferences reasonably deducible therefrom. *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006) (citing *Dep't of Gen. Servs. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwlth. 2005)). However, the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007). Notwithstanding, any doubt must be resolved in favor of the non-moving party. *Stilp*, at 781.

6. In addition, the Presiding Officer must determine whether, based on the factual pleadings, if recovery is possible. *See Rok v. Flaherty*, 527 A.2d 211, 214 (Pa. Cmwlth. 1987). Indeed, for preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery. *See Stilp*, at 781; *Milliner v. Enck*, 709 A.2d 417, 418 (Pa. Super. 1998).

III. PRELIMINARY OBJECTION

A. PRELIMINARY OBJECTION NO. 1 – THE COMPLAINT’S REQUESTED RELIEF CANNOT BE GRANTED BY THE COMMISSION AND, THEREFORE, IS LEGALLY INSUFFICIENT.

7. West Penn incorporates by reference Paragraphs 1 through 6 as if fully set forth herein.

8. The Complaint’s requested relief cannot be granted by the Commission because West Penn customers are not permitted to opt-out of or rescind smart meter installation.

9. Through the Complaint, the Complainant requests that West Penn replace his existing smart meter with an “analog meter.”

10. In doing so, the Complainant is functionally requesting he be permitted to rescind West Penn’s installation of a smart meter at his Service Address.

11. West Penn is legally required to install the smart meters by the Public Utility Code, the Commission's orders, and the Company's Commission-approved Smart Meter Installation Plan. See 66 Pa.C.S. § 2807(f); *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company for Approval of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Order June 9, 2010); *Petition of West Penn Power Company d/b/a Allegheny Power for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (Order entered June 30, 2011).

12. On June 24, 2009, the Commission issued its Smart Meter Implementation Order, which set forth requirements for the smart meter plans and procedures for the submission, review, and approval of the smart meter plans. See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009).

13. On December 31, 2012, Met-Ed, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, "the Companies") filed their Joint Petition for Approval of their Smart Meter Deployment Plan in compliance with the *Smart Meter Implementation Order*, in which they requested that the Commission: (1) find that their proposed Deployment Plan satisfies the requirements of Act 129 and the Commission's Implementation Order; (2) approve the Companies' proposed procurement and deployment of approximately 2.1 million smart meters, over 98.5% of which should be installed by the end of 2019; (3) authorize the Companies to continue to recover smart meter costs; and (4) authorize the Companies to create a regulatory asset for their investment in their existing meters to be replaced by smart meters.²

² *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994 (Petition filed December 31, 2012).

14. On June 16, 2014, the Companies submitted their revised Smart Meter Deployment Plan, which, *inter alia*, accelerated the smart meter deployment schedule laid out in their original Deployment Plan. Under the Revised Deployment Plan, the Companies proposed to deploy 170,000 smart meters by the end of 2015.³ The Commission entered its Opinion and Order approving the Revised Deployment Plan on June 25, 2014. *See 2014 Smart Meter Order*.

15. Nothing in the Public Utility Code, the Commission’s orders and regulations, or West Penn’s Smart Meter Deployment Plan states that a customer can opt-out of, or rescind, a smart meter installation.

16. Indeed, on August 16, 2022, the Supreme Court of Pennsylvania issued its Opinion affirming in part and reversing in part the Commonwealth Court’s decision in *Povacz*.⁴ Specifically, the Supreme Court in *Povacz* held that: (1) Act 129 mandates the systemwide installation of smart meters; (2) the PUC applied the correct burden of proof standard in the smart meter complaint cases arising under Section 1501 of the Public Utility Code; (3) an electric distribution company (“EDC”) cannot be required to provide an accommodation to a customer absent a Section 1501 violation; and (4) even if a smart meter complainant meets their burden of proof, the complainant is only “entitled to an accommodation to the extent allowed by Act 129 and a utility’s tariff.”⁵

17. Therefore, West Penn must retain the smart meter at the Complainant’s Service Address.

³ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Smart Meter Deployment Plan*, Docket Nos. M-2013-2341990, M-2013-2341991, M-2013-2341993, M-2013-2341994, p. 8 (Order entered June 25, 2014) (“*2014 Smart Meter Order*”).

⁴ *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020).

⁵ *See Povacz v. Pa. PUC*, 280 A.3d 975, 1012-1014 (Pa. 2022).

18. Further, even if the Complainant established that the installation and retainment of the smart meter would violate Section 1501 of the Public Utility Code, the Complainant could only receive an accommodation that is permitted under Act 129 and West Penn's Commission-approved tariff. Here, West Penn's Commission-approved tariff allows a customer, such as the Complainant, to request that the meter be relocated to a mutually-agreeable location, subject to the customer bearing the estimated expenses of relocating the Company-owned facilities, including the meter, to that new location. *See* West Penn Tariff Rule 4, Electric Pa. P.U.C. No. 40, Original Page 36.

19. As such, the Complainant's requested relief, *i.e.*, the removal of the smart meter currently at his Service Address, is inconsistent with the Public Utility Code, the Commission's orders and regulations, West Penn's Smart Meter Deployment Plan, and West Penn's Commission-approved tariff and, therefore, cannot be granted by the Commission.

20. For these reasons, the Complaint should be dismissed because the Commission cannot grant the requested relief therein.

IV. CONCLUSION

WHEREFORE, West Penn Power Company respectfully requests that the above-captioned Formal Complaint filed by Rich Bailey at Docket No. C-2023-3037788 be dismissed in its entirety pursuant 52 Pa. Code § 5.101(a)(4).

Dated: February 15, 2023

Respectfully submitted,



Daniel A. Garcia (ID # 311503)
FirstEnergy Service Company
800 Cabin Hill Drive
Greensburg, PA 15601
Phone: 724-838-6416
E-mail: dagarcia@firstenergycorp.com

Tori L. Giesler (ID # 207742)
FirstEnergy Service Company
2800 Pottsville Pike
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Preliminary Objection of West Penn Power Company to the Formal Complaint of Rich Bailey upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by electronic mail only as follows:

Rich Bailey
zubaz1@gmail.com

Dated: February 15, 2023



Daniel A. Garcia (ID # 311503)
FirstEnergy Service Company
800 Cabin Hill Drive
Greensburg, PA 15601
Phone: 724-838-6416
E-mail: dagarcia@firstenergycorp.com

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