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June 27, 2023

VIA ELECTRONIC FILING

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

Re: Orpheus and Kimberly Hanley v. Pennsylvania Power Company
Docket No. C-2023-3041147

Dear Secretary Chiavetta:

Enclosed please find the Preliminary Objection of Pennsylvania Power Company to the Formal Complaint of Orpheus and Kimberly Hanley, Complainants, to be filed in the above-referenced matter. A copy of the document has also been served upon the Complainants, as indicated by the Certificate of Service.

If you have any questions, please contact me.

Sincerely,



Daniel A. Garcia

DAG/mlr

Enclosures

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Orpheus and Kimberly Hanley,	:	
	:	
Complainants,	:	
	:	
v.	:	Docket No. C-2023-3041147
	:	
Pennsylvania 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 PENNSYLVANIA POWER COMPANY.



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Date: June 27, 2023

Attorneys for Pennsylvania Power Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Orpheus and Kimberly Hanley,	:	
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v.	:	Docket No. C-2023-3041147
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Pennsylvania Power Company,	:	
	:	
Respondent.	:	

**PRELIMINARY OBJECTION OF
PENNSYLVANIA POWER COMPANY TO THE
COMPLAINT OF ORPHEUS AND KIMBERLY HANLEY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, comes Pennsylvania Power Company (“Penn Power” 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 Orpheus and Kimberly Hanley (“Complainants”) in its entirety and with prejudice.

The instant Complaint challenges Penn Power’s installation of a smart meter at the Complainants’ address 11569 Lakeland Drive, Conneaut Lake, PA 16316 (“Service Address”).¹ As relief, the Complainants request that they be permitted to opt-out of the installation of a smart meter at the Service Address. This is the Second Formal Complaint filed by the Complainants against Penn Power disputing installation of a smart meter at the Service Address. The Complainants’ First Complaint was dismissed with prejudice because the Complainants failed to

¹ For their mailing address in Paragraph 1 of the Complaint the Complainants only list “539.” Under information and belief, the Complainants’ mailing address is P.O. Box 539, Conneaut Lake, PA 16316.

carry their burden of proof establishing that Penn Power violated the Public Utility Code, Commission Regulation, or Commission Order by requiring installation of a smart meter at the Complainants' property, or that Penn Power provided unsafe or unreasonable service in violation of 66 Pa.C.S. § 1501. *See* 52 Pa. Code § 5.101(a)(2)-(3); *see also id.* § 5.22(a)-(b).

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

In support thereof, Penn Power states as follows:

I. BACKGROUND

1. Penn Power 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 June 7, 2023, Penn Power was served with the above-captioned Complaint, which challenges the Company's installation of a smart meter at the Service Address.

3. Previously, on July 19, 2016, the Complainants filed a formal complaint also disputing the installation of a smart meter at the Service Address at Docket No. C-2016-2557487 (“*First Complaint*”).

4. The *First Complaint* was dismissed by the Commission with prejudice. *See Orpheus and Kimberly Hanley v. Pa. Power Co.*, Docket No. C-2016-2557487 (Initial Decision issued Oct. 24, 2018), *request to reopen proceedings denied* (Opinion and Order entered Dec. 19, 2019), *petition for rehearing or reconsideration denied* (Opinion and Order entered Aug. 27, 2020).

5. Penn Power herein files this Preliminary Objection to the Complaint. For the reasons explained below, Penn Power 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

6. 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).

7. 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. Cmwlt.*, 910 A.2d 775, 781 (Pa. Cmwlt. 2006) (citing *Dep't of Gen. Servs. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwlt. 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. Cmwlt. 2007). Notwithstanding, any doubt must be resolved in favor of the non-moving party. *Stilp*, at 781.

8. 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.

9. Penn Power incorporates by reference Paragraphs 1 through 8 as if fully set forth herein.

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

11. Through the Complaint, the Complainants request that Penn Power allow them to opt-out of installation of a smart meter at the Service Address.

12. Penn Power 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 Deployment 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).

13. 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).

14. On December 31, 2012, Metropolitan-Edison Company, 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

15. 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*.

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

17. 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

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).

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).

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

18. Therefore, Penn Power must install the smart meter at the Complainants’ Service Address.

19. Further, even if the Complainants established that installation and retainment of a smart meter would violate Section 1501 of the Public Utility Code, the Complainants could only receive an accommodation that is permitted under Act 129 and Penn Power’s Commission-approved tariff. Here, Penn Power’s Commission-approved tariff allows a customer, such as the Complainants, 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* Penn Power Tariff Rule 4, Electric Pa. P.U.C. No. 36, Original Page 31.

20. As such, the Complainants’ requested relief, *i.e.*, being permitted to opt-out of the installation of a smart meter at their Service Address, is inconsistent with the Public Utility Code, the Commission’s orders and regulations, Penn Power’s Smart Meter Deployment Plan, and Penn Power’s Commission-approved tariff and, therefore, cannot be granted by the Commission.


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

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

IV. CONCLUSION

WHEREFORE, Pennsylvania Power Company respectfully requests that the above-captioned Formal Complaint filed by Orpheus and Kimberly Hanley at Docket No. C-2023-3041147 be dismissed in its entirety pursuant 52 Pa. Code §§ 5.101(a)(4).

Respectfully submitted,



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Attorneys for Pennsylvania Power Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ORPHEUS HANLEY
KIMBERLY HANLEY
Complainant

v.

PENNSYLVANIA POWER COMPANY
Respondent

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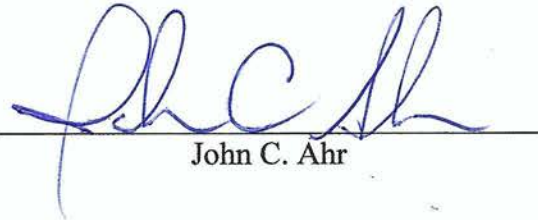
Docket No. C-2023-3041147

VERIFICATION

I, John C, Ahr, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect Pennsylvania Power Company to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904.

6/27/2023

Date



John C. Ahr

**BEFORE THE
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	:	
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	:	
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	:	
Respondent.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Preliminary Objection of Pennsylvania Power Company to the Formal Complaint of Orpheus and Kimberly Hanley 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 only as follows:

Orpheus and Kimberly Hanley
P.O. Box 539
Conneaut Lake, PA 16316

Dated: June 27, 2023



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