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December 4, 2023

VIA ELECTRONIC FILING

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

Re: Keisha Truax v. West Penn Power Company
Docket No. C-2020-3023039

Dear Secretary Chiavetta:

Enclosed 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 regarding this matter.

Very truly yours,



Daniel A. Garcia

DAG/vl

Enclosures

c: As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KEISHA TRUAX

v.

WEST PENN POWER COMPANY

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DOCKET NO. C-2020-3023039

NOTICE TO PLEAD

TO: Keisha Truax

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
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Daniel A. Garcia
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Greensburg, PA 15601

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Tori L. Giesler
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2800 Pottsville Pike
P.O. Box 16001
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Dated: December 4, 2023



Daniel A. Garcia, Esquire
James Austin Meehan, Esquire
Tori L. Giesler, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KEISHA TRUAX

v.

WEST PENN POWER COMPANY

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DOCKET NO. C-2020-3023039

**PRELIMINARY OBJECTION TO
THE FORMAL COMPLAINT OF KEISHA TRUAX**

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 Keisha Truax (“Complainant”) in its entirety and with prejudice.

The instant Complaint challenges West Penn’s installation of a smart meter at the Complainant’s former address at 106 Front Street, Apartment A, Chicora, PA 16025 (“Service Location”). As relief, the Complainant requests that the Company replace the existing smart meter at her Service Location with an analog meter. The Complainant, who was previously a tenant at the Service Location, ended service at the Service Location on August 17, 2021. The following day, service was established in the name of the new owner of the Service Location.

As explained herein, the Commission should summarily dismiss the Complaint because the Complaint lacks standing to file or prosecute a complaint on behalf of the Service location.

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 November 30, 2020, West Penn was served with the above-captioned Complaint, which challenges the Company’s installation of a smart meter at the Service Location.

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 Complainant lacks standing to participate in the proceeding.

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).

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.¹ However, the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion.² Notwithstanding, any doubt must be resolved in favor of the non-moving party.³

6. In addition, the Presiding Officer must determine whether, based on the factual pleadings, if recovery is possible.⁴ Indeed, for preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery.⁵

III. PRELIMINARY OBJECTION

A. THE COMPLAINANT LACKS STANDING TO STATE A CLAIM UPON WHICH THE COMMISSION CAN GRANT RELIEF

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

8. In her Formal Complaint, the Complainant states that she wants to replace the smart meter currently installed at the Service Location with an analog meter.

9. The relief sought through the Formal Complaint is directed toward the Service Location. As of August 17, 2021, the Complainant is no longer a tenant at the Service Location and as such has ended service at the Service Location.

¹ *Stilp v. Cmwth.*, 910 A.2d 775, 781 (Pa. Cmwth. 2006) (citing *Dep't of Gen. Servs. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwth. 2005)).

² *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwth. 2007).

³ *Stilp*, at 781.

⁴ *See Rok v. Flaherty*, 527 A.2d 211, 214 (Pa. Cmwth. 1987).

⁵ *See Stilp*, at 781; *Milliner v. Enck*, 709 A.2d 417, 418 (Pa. Super. 1998).

10. The Commission's procedural regulations allow a party to object to pleadings that are filed by complainants who lack the capacity to sue as well as complainants who lack standing to participate in a proceeding.⁶

11. The Complainant is not an authorized contact at the Service Location.

12. The Complainant cannot assert a claim on behalf of the Service Location.

13. West Penn avers that the Complainant lacks the capacity to sue and standing to file or prosecute a complaint on behalf of the Service Location and/or an account in the name of a new customer of record that has since established service at the Service Location.

14. The Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding.⁷

15. Requiring a person or entity to have a direct, immediate and substantial interest in the subject matter of a proceeding helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers.⁸

16. The Complainant cannot assert a claim on behalf of the Service Location and/or an Account of the current customer of record at the Service Location.

B. THE RELIEF REQUESTED BY THE COMPLAINANT CANNOT BE GRANTED BY THE COMMISSION AND, THEREFORE, IS LEGALLY INSUFFICIENT.

17. West Penn incorporates by reference Paragraphs 1 through 16, above, as if fully set forth herein.

⁶ See 52 PA Code § 5.102(a)(7).

⁷ *Joint Application of Pennsylvania-American Water Co. and Evansburg Water Co. for Approval of the transfer, by sale, of the water works property and rights of Evansburg Water Co. to Pennsylvania-American Water Co.*, A-212285F0046/47 and A-210870F01 (Ordered entered July 9, 1998); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975); *Landlord Service Bureau, Inc. v. Equitable Gas Co.*, 79 Pa. P.U.C. 342 (1993); *Re Equitable Gas Co.*, 76 Pa. P.U.C. 23 (1992); *Manufacturers' Association of Erie v. City of Erie - Bureau of Water*, 50 Pa. P.U.C. 43 (1976); *Waddington v. Pennsylvania Public Utility Commission*, 670 A.2d 199 (Pa. Cmwlth. 1995), *alloc. denied*, 678 A.2d 368 (Pa. 1996)

⁸ NFG, *supra*

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

19. In the Complaint, the Complainant requests that West Penn replace her existing smart meter with an analog meter.

20. In doing so, the Complainant is functionally requesting she be permitted to opt-out of West Penn's installation of a smart meter at her Service Location.

21. West Penn is legally required to install the smart meters pursuant to the Public Utility Code, the Commission's orders, and the Company's Commission-approved Smart Meter Installation Plan.⁹

22. On June 24, 2009, the Commission issued its Implementation Order, which set forth requirements for the smart meter plans and procedures for the submission, review, and approval of the smart meter plans.¹⁰

23. 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 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

⁹ 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).

¹⁰ See *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655 (Order entered June 24, 2009).

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.¹¹

24. On June 16, 2014, the Companies submitted their Revised 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 2015.¹² The Commission entered its Opinion and Order approving the Revised Deployment Plan on June 25, 2014.¹³

25. Neither the Public Utility Code, the Commission’s orders and regulations, nor West Penn’s Deployment Plan state that a customer can opt-out of, or rescind, a smart meter installation.

26. 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 I*.¹⁴ Specifically, the Supreme Court in *Povacz II* held: (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.”¹⁵

¹¹ *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).

¹² *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*”).

¹³ See *2014 Smart Meter Order*.

¹⁴ *Povacz v. Pa. PUC*, 241 A.3d 481 (Pa. Cmwlth. 2020) (“*Povacz I*”).

¹⁵ See *Povacz v. Pa. PUC*, 280 A.3d 975, 1012-1014 (Pa. 2022) (“*Povacz II*”).

27. Therefore, West Penn must install and retain the smart meter at the Service Location.

28. Further, even if the Complainant met her burden of proof and established that the installation and retainment of the smart meter violates 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 the smart 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.¹⁶

29. As such, the Complainant's requested relief, *i.e.*, replacing the smart meter currently installed at the Service Location with an "analog" meter, is inconsistent with the Public Utility Code, the Commission's orders and regulations, West Penn's Deployment Plan, and West Penn's Commission-approved tariff and, therefore, cannot be granted by the Commission.

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

¹⁶ See West Penn Tariff Rule 4, Electric Pa. P.U.C. No. 40, Original Page 36.

IV. CONCLUSION

WHEREFORE, West Penn Power Company respectfully requests that the above-captioned Formal Complaint filed by Keisha Truax be dismissed in its entirety pursuant 52 Pa. Code § 5.101(a)(4).

Respectfully submitted,



Dated: December 4, 2023

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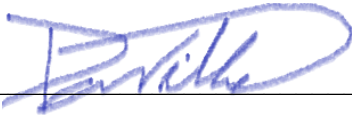
**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KEISHA TRUAX	:	
Complainant	:	
	:	
v.	:	Docket No. C-2020-3023039
	:	
WEST PENN POWER COMPANY	:	
Respondent	:	

VERIFICATION

I, David R. Villao, 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 West Penn 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.

12/4/23
Date



**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KEISHA TRUAX

v.

WEST PENN POWER COMPANY

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DOCKET NO. C-2020-3023039

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 Keisha Truax upon the individual 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:

Keisha Truax

keisha.l.truax@gmail.com

Dated: December 4, 2023



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