

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Tony Gardner	:	
	:	
v.	:	C-2025-3056317
	:	
PECO Energy Company	:	

ORDER
GRANTING PRELIMINARY OBJECTION AND
REFERRING MATTER TO MEDIATION UNIT FOR MEDIATION REVIEW

This Order grants the preliminary objection of PECO Energy Company (PECO or Company). Because the Pennsylvania Public Utility Commission (Commission) does not have the authority to award monetary damages as a remedy that portion of the Formal Complaint (Complaint) will be stricken. However, this matter will be referred to the Commission’s mediation unit for mediation review.

History of the Proceeding

On July 16, 2025, Tony Gardner (Dr. Gardner or Complainant) filed a Complaint against PECO. Dr. Gardner avers he is the sole owner of K Fish Comestible LLC (K Fish). Dr. Gardner checked the box indicating there are reliability, safety or quality problems with K Fish’s utility service.¹ Complaint ¶ 4. Dr. Gardner alleges that he placed an initial service call in June of 2025 to PECO “reporting the loss of one leg of our three-phase power line” and further alleges that PECO closed the case without appearing or providing service. *Id.*

As relief, the Complainant seeks the following: (1) immediate restoration of full three-phase power; (2) an investigation into PECO’s discriminatory service practices; and (3)

¹ Respondent admitted that it provides non-residential electric service in the name of K Fish Comestible, to 2401 N. Front Street, Philadelphia, Pennsylvania. Answer ¶ 3.

compensation requested for spoiled inventory losses, daily sales losses, electrical inspection costs, and damaged equipment. *Id.* ¶ 5.

On August 7, 2025, PECO filed a Motion to File Answer Nunc Pro Tunc.

On August 7, 2025, PECO filed an Answer and a Preliminary Objection. In its Answer, PECO denied the material allegations of providing electric service with any reliability, safety or quality issues. Answer ¶ 4.

In its Preliminary Objection, the Company requests that the portion of the Complaint pertaining to a request for monetary damages be summarily dismissed. PECO avers that under Section 5.101(a)(2) of the Commission's regulations, a request for damages constitutes impertinent matter which should be dismissed because the Commission does not have the authority to award monetary damages. *See*, 52 Pa. Code § 5.101(a)(2).

On August 18, 2025, a Motion Judge Assignment Notice was issued informing the parties that I was assigned as the Presiding Officer responsible to resolve any issues which may arise during the preliminary phase of the proceeding. PECO's Preliminary Objection is now ready for disposition.

Discussion

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections and provides:

§ 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the

legal and factual grounds relied upon and be limited to the following:

- (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).

In deciding preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. *Dep't of Auditor General v. SERS*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002). All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Ret. Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997). Therefore, the primary focus is on whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. *Id.*

Additionally, as a matter of law, to establish a legally sufficient claim, a complainant must show that the named utility company is responsible or accountable for the problem described in the complaint in order to prevail. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. P.U.C. 196 (1990). The offense must be a violation of the Pennsylvania Public Utility Code

(Code), a Commission regulation or order or a violation of a Commission-approved tariff. 66 Pa.C.S. § 701. A finding of a violation of a Commission Order, regulation, or statute, by the public utility may result in the imposition of a civil penalty on the public utility company, consistent with Section 3301 or other provisions of the Code.

In the instant case, Dr. Gardner alleges in the Complaint that K Fish experienced safety, reliability or quality of electric service issues. These claims are cognizable under the Code and Commission Regulations.² Therefore, since there is a factual dispute as to these allegations, the Complainant should be afforded the opportunity to present evidence on its claims and prove them by a preponderance of the evidence.

However, even *assuming arguendo* that K Fish proves that the PECO violated the Code, Commission regulation or order or a violation of its Commission-approved tariff, the Commission cannot award K Fish monetary compensation as relief. Although this Commission has general jurisdiction over the rates and services of public utilities operating in Pennsylvania, the Commission only has the powers and authority granted to it by the General Assembly in the Code. Nothing in the Code confers jurisdiction upon the Commission to award monetary damages. *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977) (*Feingold*); *DeFrancesco v. Western Pa. Water Co.*, 453 A.2d 595 (Pa. 1982); *Elkin v. Bell of Pa.*, 420 A.2d 371 (Pa. 1980).

Rather, monetary damage payments must be pursued and ordered by a court of competent jurisdiction, such as a county court of common pleas or magisterial district justice, not the Commission. *Feingold*. A finding, if any, that PECO violated a Commission Order, regulation or statute, may result in the imposition of a civil penalty, but does not require it, consistent with Section 3301 or other provision of the Code. Further, it should be noted that a fine, if any, that is imposed on PECO is payable to the Commonwealth of Pennsylvania, not the customer—K Fish, in this instance. However, this Order also clarifies that the Commission may,

² For example, *see* 66 Pa.C.S. § 1501 (providing that every public utility must provide reasonable service); *Kossmann v. Pa. PUC*, 694 A.2d 1147 (Pa. Cmwlth. 1997) (holding that a Company's Commission-approved tariff is *prima facie* reasonable, has the full force of law and is binding on the utility and the customer).

within its authority, order a correction of incorrect billing if that claim is proven by the Complainant.

Therefore, to the extent that K Fish seeks compensatory damages, PECO's preliminary objection will be sustained because the Commission does not have the authority to award monetary damages.

However, viewing the Complaint in the light most favorable to K Fish as the non-moving party and accepting as true every well-pleaded material fact in the Complaint, as well as every reasonable inference from those facts, K Fish raised issues of fact as to the safety, reliability and quality of PECO's electric service.

Under the circumstances, it is appropriate to transfer this matter to the Mediation Unit of the Office of Administrative Law Judge.

The parties should be advised, however, that if they do not reach a settlement and this matter proceeds to an evidentiary hearing, Complainant will bear the burden to present substantial evidence the Company violated a statute which the Commission has jurisdiction to administer, a tariff provision, or a regulation or order of the Commission. 52 Pa. Code § 5.12(a). The Complainant, as an LLC, must also retain an attorney should this matter not be resolved through mediation and proceed to an evidentiary hearing. 52 Pa. Code § 1.21(b).

Thus, this matter is referred to the Mediation Unit of the Office of Administrative Law Judge.

C-2025-3056317 - TONY GARDNER v. PECO ENERGY COMPANY

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