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April 6, 2015

VIA E-FILING

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

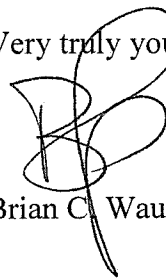
Re: Thomas H. Kelosky v. Pennsylvania Power Company
Docket No. F-2015-2472094

Dear Secretary Chiavetta:

On behalf of Pennsylvania Power Company, I have enclosed for electronic filing the Preliminary Objections of Pennsylvania Power Company to the Formal Complaint of Thomas H. Kelosky in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Brian C. Wauhop

BCW/tlg
Enclosure

cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THOMAS H. KELOSKY

v.

PENNSYLVANIA POWER COMPANY

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:
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:
:

Docket No. F-2015-2472094

NOTICE TO PLEAD

TO: Thomas H. Kelosky
797 Soap Run Road
Fombell, PA 16123

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of Pennsylvania Power Company to the Formal Complaint of Thomas H. Kelosky within **ten (10) days** from service of this Notice, the Preliminary Objections may be granted. All pleadings must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Pennsylvania Power Company, and where applicable, the Administrative Law Judge presiding over the case.

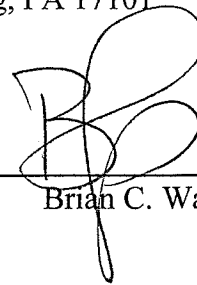
File with:

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

With a copy to:

Brian C. Wauhop
Buchanan Ingersoll & Rooney, PC
409 North Second Street
Suite 500
Harrisburg, PA 17101

Dated: April 6, 2015



Brian C. Wauhop, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THOMAS H. KELOSKY	:	
	:	
v.	:	Docket No. F-2015-2472094
	:	
PENNSYLVANIA POWER COMPANY	:	

**PRELIMINARY OBJECTION TO THE COMPLAINT OF
THOMAS H. KELOSKY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pennsylvania Power Company (“Penn Power” or the “Company”), by and through its counsel Brian C. Wauhop, Alan Michael Seltzer, and Buchanan Ingersoll & Rooney PC, files this Preliminary Objection pursuant to Section 5.101(a) of Pennsylvania Public Utility Commission (“Commission”) regulations at 52 Pa. Code § 5.101(a)(4), and in support thereof, avers as follows:

I. Introduction

1. Through this Preliminary Objection, Penn Power seeks the dismissal of a Formal Complaint filed by Thomas H. Kelosky (“Complainant”), the owner of a residential rental property (“Rental Property”) located at 117 Annie Lane, Fombell, Pennsylvania 16123 alleging that Penn Power improperly transferred the electric service account balance for one of the Complainant’s tenants at the Rental Property, Jim Link (“Tenant”), to the Complainant’s electric service account (“Account”) after the Company confirmed the presence of foreign load on the Tenant’s electric service meter at the Rental Property .

2. The Complainant admits in the Formal Complaint that a shared metering condition exists at the Rental Property, i.e., a water pump that provides water service to a residence located at 107 Annie Lane, Fombell, Pennsylvania 16123 is wired to the Tenant’s

electric service meter. (Compl. ¶¶ 4(B), 4(D)). The electricity consumed by the water pump to serve 107 Annie Lane is “foreign load”¹ on the Tenant’s electric service meter and as such, constitutes a shared metering condition under Section 1529.1 of the Public Utility Code (“Code”), 66 Pa.C.S. § 1529.1, (“Act 54”).

3. In the Formal Complaint, the Complainant demands removal of the \$5,525.50 balance transferred to the Account, claiming he is not responsible for these charges. (Compl. ¶ 4(I)). Granting this relief is inconsistent with and in violation of the Commission’s current foreign load policy under Code Section 1529.1, which requires a utility to list an electric service account, including any arrearages, in the name of the owner of the building upon the finding of foreign load and imposes on the owner the responsibility for paying the utility services to the premises until the shared metering has been corrected. *Ace Check Cashing, Inc. v. Philadelphia Gas Works, Eddie and Jennifer West*, Docket No. C-2008-2056428 (Final Order entered May 21, 2010); *JLJ Enterprises, LLC v. Metropolitan Edison Company*, Docket No. F-2014-2440049 (Final Order on Exceptions entered March 26, 2015).

4. As explained in greater detail below, even if all of the facts in the Formal Complaint are accepted as true, they do not constitute a violation of any law which the Commission has jurisdiction to administer, or of any regulation or order of the Commission. *See* Code Section 701, 66 Pa.C.S. § 701.

5. As a result, the Company requests that this Preliminary Objection be granted and the Commission dismiss the Formal Complaint with prejudice.

¹ The presence of “foreign load” is *sine qua non* for a shared metering condition. “In most cases of foreign load, another person’s service is attached to the tenant’s meter or the service to a common area is attached to the tenant’s meter.” *Gray v. PECO Energy Co.*, Docket No. F-2012-2285766 (Final Order entered December 3, 2012).

II. Background

6. Penn Power is an electric distribution company that is certificated as a public utility in Pennsylvania.

7. On or about March 3, 2015, the Complainant filed a Formal Complaint with the Commission against Penn Power at the above-captioned docket requesting that the Commission direct the Company to credit the Complainant the balance transferred to the Account, \$5,525.50. (Compl. ¶ 4(I)).

8. The Formal Complaint concerns the Account for electric service provided by the Company to the Rental Property. (*Id.* at ¶ 1.)

9. Importantly, the Complainant admits that a shared metering condition existed at the Rental Property (Compl. ¶¶ 4(D), 4(H)), and that the Company timely advised him of this fact. (Compl. ¶ 4(C)).

10. On August 15, 2014, the Complainant filed an Informal Complaint with the Commission's Bureau of Consumer Services ("BCS") at Case No. 3275336 disputing the balance the Company transferred to the Account from the Tenant's account pursuant to Act 54.² (*Id.* ¶ 4(A).) In the Informal Complaint, the Complainant admitted that a shared metering condition existed at the Rental Property. *See* Exhibit 1 to the Company's Answer with New Matter.

11. On or about March 16, 2015, the Formal Complaint was served on Penn Power.

12. In the Formal Complaint, the Complainant once again admits that a shared metering situation exists at the Rental Property, i.e., the water pump supplying water to 107

² Pursuant to 52 Pa. Code §§ 5.406 and 5.408, the Company requests that the Commission and the presiding officer assigned to resolve this preliminary objection take official or judicial notice of the opening and closing reports of the Informal Complaint filed with the BCS at Case No. 3275336, which are public documents on file with the Commission and discussed at length by the Complainant in the Formal Complaint. These documents are attached as Exhibit 1 to the Company's Answer and New Matter filed contemporaneously with this Preliminary Objection.

Annie Lane is wired to the meter recording electric usage for the Tenant's account. However, the Complainant demands that the balance transferred previously by the Company in accordance with Act 54 to the Account be removed because Penn Power's application of these charges to the Account is "unjust" and "inequitable." (Compl. ¶ 4(I).)

13. Penn Power is timely filing its Answer and New Matter contemporaneously with this Preliminary Objection, which Answer and New Matter is incorporated into this Preliminary Objection as if fully set forth herein.

III. Preliminary Objection Regarding Legal Insufficiency Pursuant to 52 Pa. Code § 5.101(a)(4).

14. The Complainant challenges no aspect of the Company's provision of retail electric service other than the Company's transfer of the balance on the Tenant's account to the Complainant's Account, which the Company was obligated to do pursuant to Act 54, after confirming the shared metering condition at the Rental Property. As noted above, the Complainant admits the existence of the shared metering condition that warranted the balance transfer. Therefore, the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief.

15. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101; see also *Equitable Small Transportation Interveners v. Equitable Gas Company*, Docket No. C-00935435 (July 18, 1994).

16. 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.

17. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners*, supra.

18. The Commission may dismiss a complaint without hearing if, in its opinion, a hearing is not necessary in the public interest. 52 Pa. Code § 5.21(d).

19. The only relief demanded by the Complainant is a reversal of the balance transfer from the Tenant's Account to the Complainant's Account that the Company was *required* by Pennsylvania law to make after confirming the shared metering condition at the Rental Property .

20. In accordance with Code Section 701, a person may complain about something done or omitted to be done by a public utility in violation of any law, regulation or order. 66 Pa.C.S. § 701.

21. The Formal Complaint contains no allegations that would constitute a violation of the Code, Commission order or regulation. Assuming all the facts pleaded in the Complaint are true, the Complainant has failed to state a claim upon which the Commission can grant relief.

22. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller 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). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

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

24. The disposition of this Preliminary Objection is controlled by the provisions of Code Section 1529.1, which provide as follows:

If [a] . . . residential building contains one or more dwelling units not individually metered, an affected public utility shall forthwith list the account for the premises in question in the name of the owner, and the owner shall thereafter be responsible for the payment for the utility services rendered thereunto[.]

66 Pa.C.S. § 1529.1

25. In *Ace Check Cashing*, supra, the Commission held that public utilities are required to list the electric service account, including any arrearages, in the name of the landlord upon the finding of foreign load. The landlord has the responsibility to pay the utility bills until the foreign load is corrected. Once the foreign load is corrected by the landlord and verified by the utility, the utility will place the account back in the name of the tenant. However, the arrearages, if any, are required to remain with the landlord.

26. In *Elizabeth Santos v. Metropolitan Edison Company*, Docket Number C-00967757, (Final Order entered August 7, 1997) the Commission held that upon discovery of a foreign load, the utility must place the electric service account in the landlord's name and collect

any unpaid bills only from the landlord. As a result, the Complainant is responsible for the tenant's delinquent account balance, including arrearages. *Accord JJJ Enterprises, LLC v. Metropolitan Edison Company*, Docket No. F-2014-2440049 (Final Order on Exceptions entered March 26, 2015 affirming the Commission's existing Act 54 policy and dismissing rental property owner's Formal Complaint on Preliminary Objections).

27. Applied here, Penn Power transferred \$5,525.50 from the Tenant's account – including arrearages – to the Complainant's Account pursuant to 66 Pa.C.S. § 1529.1 and Commission policy after Penn Power confirmed the existence of a shared metering condition at the Rental Property. The Complainant admitted the existence of a shared metering condition in the Formal Complaint:

Apparently, neither Penn Power *nor myself* were aware of the shared meter until July 11, 2014.

(Compl. ¶ 4(D)) (emphasis added).

28. The Complainant admitted the same facts in the Informal Complaint:

[Complainant] requested [Penn Power] hold off [termination of electric service to] Jim Link] a couple days because the same well supplied [water] for both 117 and 107 Annie Lane.

(Opening Report of BCS Case No. 3211048.)

29. Rather than deny the existence of a shared metering condition, the Complainant merely argues that he should not be held responsible for the Tenant's account balance. However, the Commission's current foreign load policy does not support this argument. In fact, that policy requires a utility to list an electric service account, including any arrearages, in the name of the owner upon the finding of foreign load, and imposes on the owner the responsibility for paying the utility services to the premises until the shared metering has been corrected. *See James W. Massey v. Peoples Natural Gas Company LLC*, Docket No. C-2013-2397016, p. 13 (Order

entered February 12, 2015 holding that once the existence of foreign load is verified, any dispute between the landlord and the tenant regarding financial responsibility is a matter to be resolved in the court of common pleas); *Morykan v. Metropolitan Edison Company*, Docket No. C-2014-2403154 (Initial Decision entered April 8, 2014 sustaining preliminary objections and dismissing complaint for lack of subject matter jurisdiction, holding that disputes over balance transfers per Act 54 are “precisely the issue . . . that the Commission lacks jurisdiction to hear,” and that “there is ‘no *de minimus* exception,’ . . . the reason for the change in policy was to incent the landlord to correct the foreign load situation” present at the landlord’s property); *see also Ace Check Cashing*, *supra* (reversing the foreign load policy established in *Afshari v. PPL Electric Utilities Corp., et al.*, Docket No. C-20055547 (Final Order entered April 9, 2008)).

30. It is both clear and undisputed that Penn Power fully complied with the Code and Commission precedent in handling this foreign load situation after it discovered the existence of a shared metering condition at the Rental Property. Assuming the facts pleaded in the Formal Complaint are true, as the Commission must for the purposes of a preliminary objection, the Complainant has failed to allege that Penn Power has committed or omitted an act in violation of a Commission statute, regulation, order, or Penn Power’s tariff. *County of Allegheny*, *supra*. In fact, and as noted above, the Formal Complaint actually admits that the Company transferred the balance due on the Tenant’s electric service account to the Complainant’s Account after confirming the shared metering condition at the Rental Property. (Compl. ¶ 4(F).) As explained above, as a matter of law, the Company is required to transfer the balance on the Rental Property to the Complainant’s Account after the Company confirmed the existence of a shared metering condition at the Rental Property. Contrary to the assertion in the Formal Complaint, the

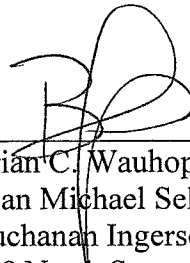
Company has done nothing other than follow the law with respect to the shared metering/foreign load condition at the Rental Property.

31. Therefore, the Formal Complaint is legally insufficient because it fails to state a claim upon which the Commission can grant relief. *See* 52 Pa. Code § 5.101(a)(4); *Roc v. Flaherty*, supra. Furthermore, a hearing in this matter is not necessary and would not serve the public interest. 66 Pa.C.S. §703(b).

IV. Conclusion

WHEREFORE, for the foregoing reasons, Pennsylvania Power Company respectfully requests that the Commission grant its Preliminary Objection and (i) dismiss the Formal Complaint in its entirety because the Complainant has not stated a claim for which relief may be granted and (ii) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,



Brian C. Wauhop, Esquire
Alan Michael Seltzer, Esquire
Buchanan Ingersoll & Rooney P.C.
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357
(215) 665-4016

Dated: April 6, 2015

Attorneys for
Pennsylvania Power Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THOMAS H. KELOSKY

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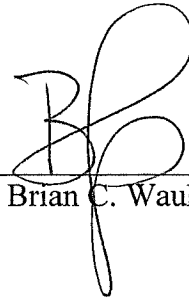
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

First Class Mail

Thomas H. Kelosky
797 Soap Run Rd.
Fombell, PA 16123

Dated this 6th day of April, 2015.



Brian C. Wauhop, Esq.