**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Thomas H. Kelosky :

 :

 v. : F-2015-2472094

 :

Pennsylvania Power Company :

**INITIAL DECISION**

Before

Susan D. Colwell

Administrative Law Judge

INTRODUCTION

 This Initial Decision grants the preliminary objections of a utility and dismisses a formal complaint seeking relief from the utility's placement of a tenant's account balance in the landlord's name upon the discovery of a shared meter.

HISTORY OF THE PROCEEDING

On March 3, 2015, Thomas H. Kelosky (Complainant), by and through his attorney, Gene G. Dimeo, Esq., filed a formal Complaint against the Pennsylvania Power Company (Penn Power or Respondent) alleging that there are incorrect charges on Complainant's bill due to a shared meter. Complainant seeks to have the account balance that accrued under a tenant's name removed from Complainant's account.

 According to the Commission's electronic document handling system, the Complaint was served electronically on March 15, 2015.[[1]](#footnote-1)

 Penn Power filed its Answer, New Matter and Preliminary Objections (POs) on April 6, 2015. In its Answer, Respondent denies that there are incorrect charges on Complainant's bill and avers that the charges are accurate for the service provided via a properly functioning electric meter in accordance with the service rates reflected in the Company's current tariff. Penn Power admits that is transferred charges from one of Complainant's tenant's accounts to Complainant's account due to the presence of shared metering at the rental property. Respondent admits further that it advised the Complainant of the existence of shared metering on July 10, 2014, after a Company field representative discovered the meter recording usage at the apartment of the tenant was also recording usage for a well pump that provided water service to another dwelling.

 In New Matter, Penn Power avers that the monetary relief sought by the Complainant is beyond the jurisdiction of the Commission to grant. Penn Power avers that its actions were consistent with the law and that even if all of the Complainant's facts are assumed to be true, the Complaint fails to state a claim for which relief can be granted.

 In POs, Penn Power again reiterates that the Complaint fails to state a claim for which relief can be granted as the Company's actions were consistent with the applicable law.

 The time for filing a responsive pleading has run, and no responsive pleading has been filed. Therefore, the POs are ripe for disposition.

FINDINGS OF FACT

 1. Complainant is Thomas H. Kelosky, 797 Soap Run Road, Fombell PA 16123.

 2. Respondent is Pennsylvania Power Company, a jurisdictional public utility providing residential and commercial electric distribution service in the Commonwealth of Pennsylvania.

 3. Complainant is the owner of a property located at 117 Annie Lane in Fombell, PA.

 4. On July 10, 2014, Penn Power informed Complainant that there was a shared meter at 117 Annie Lane, also supplying 107 Annie Lane.

 5. The balance for the electric account at 117 Annie Lane was place in the name of the Complainant.

 6. Complainant installed a separate meter.

 7. The total amount for the tenant's account remains in Complainant's name.

DISCUSSION

 Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company,* 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994). When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleaded factual averments . . . that no recovery or relief is possible. *P. J. S. v. Pa. State Ethics Commission,* 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).” *Dept. of Auditor General, et al. v. State Employees’ Retirement System, et al.,* 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003).

 The rules regarding preliminary objections are as follows:

**§ 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).

 In reviewing preliminary objections, only the facts in the Complaint can be presumed to be true in order to determine whether recovery is possible. In order for Complainant to prevail ultimately, there must be a statute, regulation or order which the Commission is authorized to enforce. The Complaint must set forth anything done or omitted to be done by the utility company in violation of any law which the Commission has jurisdiction to administer. 66 Pa.C.S. § 701; 52 Pa.Code § 5.21(a).

 Therefore, only the facts in the Complaint can be presumed to be true in order to determine whether recovery is possible. Complainant admits that there was foreign load on the tenant's meter, and that the tenant's arrearage was transferred to the Complainant's account and not transferred back after the foreign load was corrected.

 The issue is whether the Complaint states a violation that the Commission may adjudicate and for which the Commission may provide a remedy. If so, then the POs will be denied. If not, then the POs will be granted and the Complaint denied.

 In the case of *A-1 Realty v. Pa. Publ. Util. Comm'n,* Docket No. 885 C.D. 2012 (January 4, 2013), 2013 Pa. Commw. LEXIS 4, ("*A-1 Realty*"), the Commonwealth Court affirmed the PUC's order adopting an Initial Decision which dismissed a complaint where the amount at issue was also low compared to overall usage. In *A-1 Realty,* lots for the placement of mobile homes were leased by the owner of the park, and wiring for communal street lighting was connected to the nearest lot's electric box, at an estimated cost of $6.54 to $9.67 per box per month. The lot owner gave tenants to whose property the street lights were wired a $10.00 monthly rental discount to compensate them for the additional electric expense. When two lot lessors contacted the electric distribution company (EDC) to determine whether the $10 would be sufficient to cover a month's lighting, the EDC investigated, discovered the foreign load, and transferred the lot lessors' electric bills into the name of the lots' owner. The foreign load was corrected, but the EDC refused to return the arrearage to the tenants' accounts. The lot owner filed a complaint with the PUC, which found that the EDC's actions were consistent with the law.

On appeal, the Commonwealth Court found that the Public Utility Code does not permit a utility customer to circumvent the wording of the statute by agreeing to foreign load, and importantly, that the EDC cannot return the arrearage to the original customer/tenant. The statute reads:

**[I]f** the mobile home park or **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. In the case of individually metered dwelling units, unless notified to the contrary by the tenant or an authorized representative, an affected public utility shall list the account for the premises in question in the name of the owner, and the owner shall be responsible for the payment for utility services to the premises.

[66 Pa.C.S. § 1529.1(b)](https://www.lexis.com/research/buttonTFLink?_m=8872105b304ec7b9345d7e70e8285000&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20Commw.%20LEXIS%204%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=36&_butInline=1&_butinfo=66%20PA.C.S.%201529.1&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAl&_md5=accd0e0daae67d6d1b6d1b67529c02e2) (emphasis added by the Court).

 The phrase "not individually metered" is defined as "the utility meter for the unit is registering a foreign load, or usage not exclusive to the dwelling unit or its occupants." *Del Vecchio v. PPL Elec. Util. Corp*., Docket No. Z-01464793 (Pa. PUC 2005); *see also Cosme v. PECO Energy Co*., Docket No. C-2010-2171497 (Pa. PUC 2012); *Albright v. UGI Penn Natural Gas Co., Inc*., Docket No. F-2009-2139408 (Pa. PUC 2012).

Based upon the above conclusion, we must review [Section 1529.1(b)](https://www.lexis.com/research/buttonTFLink?_m=8872105b304ec7b9345d7e70e8285000&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20Commw.%20LEXIS%204%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=42&_butInline=1&_butinfo=66%20PA.C.S.%201529.1&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAl&_md5=b78a6422a6c0633f5cd81ecc6eebec5c) of the Code to determine whether it permits tenants to accept utility service which is not exclusive to their homes. [Section 1529.1(b)](https://www.lexis.com/research/buttonTFLink?_m=8872105b304ec7b9345d7e70e8285000&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20Commw.%20LEXIS%204%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=43&_butInline=1&_butinfo=66%20PA.C.S.%201529.1&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAl&_md5=340bd840f899e62fa0bb511f0219cd4c) of the Code specifically states: "if the mobile home park . . . 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 . . . ." (Emphasis added). It is well established that "shall' is mandatory for purposes of statutory construction when a statute is unambiguous." [*Dep't of Transp. v. McCafferty*, 563 Pa. 146, 163, 758 A.2d 1155, 1164 (2000)](https://www.lexis.com/research/buttonTFLink?_m=8872105b304ec7b9345d7e70e8285000&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20Commw.%20LEXIS%204%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=45&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b563%20Pa.%20146%2c%20163%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAl&_md5=3ccffd1c4b81c7f6e281bd3d3f5b605e). Thus, tenants are not permitted to accept utility service which is not exclusive to their homes.

*A-1 Realty* at 6.

 Just as the PUC properly determined that the utility was obligated under the Code to list the lot lessors' accounts in the lot owner's name in *A-1 Realty,* the Respondent here was also obligated to list the account in the Complainant's name as soon as the foreign load was identified. The Respondent's action was required by statute. The utility and this Commission are bound by the Public Utility Code.

 In *A-1 Realty,* as in the present case, the Complainant sought to have the arrearage transferred back to the tenants following correction of the foreign load. There is no provision in the law to support a transfer back of the arrearage.

 While this may seem harsh, the intent of the statute is to prevent landlords from taking unfair advantage of tenants by placing responsibility for payment of electricity used in public areas on the tenant. The statute shifts the duty to pay for the meter which registers the public area usage to the landlord, and it does not shift responsibility for electricity already used back to the tenant even when the meter account is placed back in the tenant's name. This represents a policy decision reached by the legislature and memorialized and enforced through the Public Utility Code. Accordingly, the statute requires that the arrearage from the tenant's account prior to the transfer to the Complainant's account must remain with the Complainant.

 The actions of the Respondent were legally sound. Accordingly, the Complainant has failed to state a claim upon which relief can be granted, and therefore the Preliminary Objections are granted. The Complaint is dismissed.

CONCLUSIONS OF LAW

 1. The Commission has jurisdiction over the subject matter of this case.

 2. Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company,* 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).

 3. When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleaded factual averments . . . that no recovery or relief is possible. *P. J. S. v. Pa. State Ethics Commission,* 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).” *Dept. of Auditor General, et al. v. State Employees’ Retirement System, et al.,* 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003).

 4. Legal insufficiency of a pleading is a proper basis for a preliminary objection. 52 Pa. Code § 5.101(a)(4).

 5. In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the Complaint, recovery or relief is possible. *Dept. of Auditor General, et al v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003), 2003 Pa. Commw. LEXIS 849; *P.J.S. v. Pa. State Ethics Comm’n,* 669 A.2d 1105 (Pa. Cmwlth. 1996), 1996 Pa. Commw. LEXIS 11. 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), 2002 Pa. Commw. LEXIS 580.

 6. 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’ Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997) 1997 Pa. Commw. LEXIS 148.

 7. In the case of individually metered dwelling units, unless notified to the contrary by the tenant or an authorized representative, an affected public utility shall list the account for the premises in question in the name of the owner, and the owner shall be responsible for the payment for utility services to the premises. [66 Pa.C.S. § 1529.1(b)](https://www.lexis.com/research/buttonTFLink?_m=8872105b304ec7b9345d7e70e8285000&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20Commw.%20LEXIS%204%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=36&_butInline=1&_butinfo=66%20PA.C.S.%201529.1&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAl&_md5=accd0e0daae67d6d1b6d1b67529c02e2).

 8. The phrase "not individually metered" is defined as "the utility meter for the unit is registering a foreign load, or usage not exclusive to the dwelling unit or its occupants." *Del Vecchio v. PPL Elec. Util. Corp*., Docket No. Z-01464793 (Pa. PUC 2005); *see also Cosme v. PECO Energy Co*., Docket No. C-2010-2171497 (Pa. PUC 2012); *Albright v. UGI Penn Natural Gas Co., Inc*., Docket No. F-2009-2139408 (Pa. PUC 2012).

 9. It is well established that "shall' is mandatory for purposes of statutory construction when a statute is unambiguous." [*Dep't of Transp. v. McCafferty*, 563 Pa. 146, 163, 758 A.2d 1155, 1164 (2000)](https://www.lexis.com/research/buttonTFLink?_m=8872105b304ec7b9345d7e70e8285000&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2013%20Pa.%20Commw.%20LEXIS%204%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=45&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b563%20Pa.%20146%2c%20163%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAl&_md5=3ccffd1c4b81c7f6e281bd3d3f5b605e).

 10. There is no provision in the law to support a transfer back of the arrearage.

 11. The Complaint fails to state a claim upon which relief can be granted.

ORDER

 THEREFORE,

 IT IS ORDERED:

 1. That the Preliminary Objections filed by Pennsylvania Power Company in the case captioned *Thomas H. Kelosky v. Pennsylvania Power Company* at Docket No. F-2015-2472094 are granted.

 2. That the Complaint filed Thomas H. Kelosky against Pennsylvania Power Company at Docket No. F-2015-2472094, is dismissed.

 3. That the Secretary mark this docket closed.

Dated: May 11, 2015 /s/

 Susan D. Colwell

 Administrative Law Judge

1. Penn Power has signed a waiver of the Section 702 requirements for service of formal complaints, 66 Pa.C.S. 702, and has agreed to electronic service instead under the Commission’s Waiver of 702 program. Service is listed in the Audit History of the case as having been effected on March 15, 2015. [↑](#footnote-ref-1)