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September 24, 2009

**Via Electronic Filing**

James J. McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120


Re: PPL Electric Utilities Corporation  
v. Buffalo Valley Telephone Company, et seq.  
Docket No. C-2009-2124528, et seq.

Dear Secretary McNulty:

Enclosed please find the Respondents' Joint Preliminary Objections, being filed in the above captioned consolidated matter. These Joint Preliminary Objections are being filed on behalf of Verizon Pennsylvania Inc.; Verizon North Inc.; and the Pennsylvania Telephone Association on behalf of member companies: Buffalo Valley Telephone Company; Windstream Pennsylvania, LLC; Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company; Conestoga Telephone & Telegraph Company; Denver and Ephrata Telephone and Telegraph Company; Frontier Communications of Pennsylvania, LLC; Ironton Telephone Company; Lackawaxen Telecommunications Services; Frontier Communications - Lakewood, LLC.; TDS Telecom/Mahanoy & Mahantango Telephone Company; Pennsylvania Telephone Company; The North-Eastern Pennsylvania Telephone Company; Palmerton Telephone Company; South Canaan Telephone Company; TDS Telecom/Sugar Valley Telephone Company; and The United Telephone Company of Pennsylvania LLC d/b/a Century LINK.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

  
Suzan D. Paiva

SDP/slb  
Enc.

**Via E-Mail and First Class U.S. Mail**  
cc: The Honorable Veronica A. Smith  
Certificate of Service

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the Respondents' Joint Preliminary Objections of Verizon Pennsylvania Inc., Verizon North Inc. and the Pennsylvania Telephone Association, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).


Dated at Philadelphia, Pennsylvania, this 24<sup>th</sup> day of September, 2009.

**VIA E-MAIL and USPS FIRST CLASS**

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Verizon Pennsylvania Inc.  
Verizon North Inc.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PPL ELECTRIC UTILITIES  
CORPORATION

v.

BUFFALO VALLEY TELEPHONE  
COMPANY, *et seq.*

:  
:  
:  
: Docket No. C-2009-2124528, *et seq.*  
:  
:  
:

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**NOTICE TO PLEAD**

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TO:


Paul Russell, Esquire  
Office of General Counsel  
PPL Electric Utilities, Inc.  
2 North 9th Street  
Allentown, PA 18101

David B. MacGregor, Esquire  
John Isom, Esquire  
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Harrisburg, PA 17101

You are hereby notified that the Respondents have filed, pursuant to 52 Pa. Code §§5.101 *et seq.*, Preliminary Objections to the Formal Complaint in the above-captioned proceeding. You may submit a response to the Preliminary Objections within ten (10) days pursuant to 52 Pa. Code § 5.101(f). If no response is submitted, the presiding officer may rule on the Preliminary Objections without a response from you, thereby requiring no other proof. All Pleadings, such as a response to the Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Respondents.

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*Counsel for Verizon Pennsylvania Inc.  
and Verizon North Inc.*

Dated: September 24, 2009

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PPL ELECTRIC UTILITIES	:	
CORPORATION	:	
	:	
v.	:	Docket No. C-2009-2124528, <i>et seq.</i>
	:	
BUFFALO VALLEY TELEPHONE	:	
COMPANY, <i>et seq.</i>	:	

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**RESPONDENTS' JOINT PRELIMINARY OBJECTIONS**

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Verizon Pennsylvania Inc. and Verizon North Inc. (together, "Verizon") and the Pennsylvania Telephone Association ("PTA"), on behalf of its member companies<sup>1</sup> (collectively, "respondents"), hereby submit the following Preliminary Objections, pursuant to 52 Pa. Code § 5.101(a)(1) and (4), to the Complaint filed by PPL Electric Utilities Corporation ("PPL"). In support of these Preliminary Objections, respondents aver as follows:

**I. INTRODUCTION**

Having unilaterally terminated the current joint use agreement it negotiated with the respondent telephone companies five years ago to govern the respective use of each others' poles, PPL has now apparently abandoned efforts to voluntarily negotiate a replacement agreement and seeks to enlist this Commission to force the respondents,

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<sup>1</sup> The PTA respondents are Buffalo Valley Telephone Company; Windstream Pennsylvania, LLC; Commonwealth Telephone Company LLC d/b/a Frontier Communications Commonwealth Telephone Company; Conestoga Telephone & Telegraph Company; Denver and Ephrata Telephone and Telegraph Company; Frontier Communications of Pennsylvania, LLC; Ironton Telephone Company; Lackawaxen Telecommunications Services; Frontier Communications - Lakewood, LLC.; TDS Telecom/Mahanoy & Mahantango Telephone Company; Pennsylvania Telephone Company; The North-Eastern Pennsylvania Telephone Company; Palmerton Telephone Company; South Canaan Telephone Company; TDS Telecom/Sugar Valley Telephone Company; and The United Telephone Company of Pennsylvania LLC d/b/a Century LINK.

against their will, to sign a new contract containing terms and provisions demanded by PPL – a form of contract that PPL concedes would shift as much as \$12 million in annual revenue to PPL and away from the respondents and would impose various new costs, obligations and duties on the respondents.

PPL fails to allege any provision of the Public Utility Code that would provide jurisdiction for this Commission to intervene in the negotiation of a private contract in this manner. In fact, this Commission has squarely rejected a similar attempt to invoke Commission jurisdiction to alter the terms of an agreement for the joint use of poles. In *ALLTEL Pennsylvania, Inc. v. West Penn Power Company*, Docket No. C-00992532 (Opinion and Order entered July 26, 2001) (“*West Penn*”), the Commission recognized that, under 66 Pa. C.S. § 508, its authority to “vary, reform, or revise” certain public utility contracts is limited only to the situation where such action is required to protect “the public interest and the general well-being of the Commonwealth.” A request to alter a joint use agreement to impose provisions that are designed to be more favorable to one of the contracting parties than the previously negotiated arrangements is not a matter of the “public interest,” but rather is the sort of private interest that does not meet the “statutory standard” of Section 508. *West Penn*, slip op. at 4, 8, 17. PPL’s demand here is no different in substance from the request made in *West Penn*, which the Commission found was not within the restricted authority afforded to it under Section 508.

Accordingly, the Commission should dismiss PPL’s Complaint because the relief requested is outside the Commission’s statutory jurisdiction, or alternatively because the Complaint fails to state a claim under Section 508 and the Complaint is therefore legally insufficient. 52 Pa. Code § 5.101(a)(1) and (4).

## II. PRELIMINARY OBJECTIONS

### A. Background

1. PPL is an electric distribution company that provides service within its designated service territory in areas of eastern and central Pennsylvania. (Complaint ¶ 2; 66 Pa. C.S. § 2803).

2. The respondents are local exchange telecommunications companies that provide telephone and other services in geographic service territories that overlap PPL's service territory. (Complaint ¶ 3; 66 Pa. C.S. § 3012).

3. For decades, PPL and the respondents have operated under various forms of "joint use agreements," which are privately negotiated commercial contracts providing each party with the right of joint use of the other party's poles within its service territory under specified rates, terms and conditions.

4. The current joint use agreements date from approximately January of 2004 and contain provisions, including as to pricing, which PPL sought to include. While PPL has entered into a separate joint use agreement with each of the respondent, the agreements are substantially similar. PPL attached the basic form of agreement to its Complaint as Attachment "A". (Complaint ¶ 6).

5. The current joint use agreements allow either party to terminate the agreement upon one year's notice, or else the agreement automatically continues. If the agreement is terminated – the process PPL has set in motion here – such termination affects only new attachments. All existing attachments, and underlying licenses, remain in effect and subject to the terms of the agreements going forward. (Complaint,

Attachment A, Section 3.1 and 3.3). In other words, only the right of prospective attachment is terminated, not any existing right.

6. Beginning in October of 2007, PPL provided one-year's notice to most of the respondents that it was terminating the then-effective joint use agreements at various times ranging from October of 2008 to January of 2009. (Complaint ¶ 10).

7. PPL's Complaint asserts that it wished to negotiate new agreements with the respondents, and that it commenced negotiations for a new agreement in May of 2008. The parties exchanged various drafts and proposals and participated in various meetings, but have yet to reach agreement on a new form of contract. (Complaint ¶ 10-11).

8. On or about July 31, 2009, PPL filed the above-captioned Formal Complaint demanding that this Commission intervene in the ongoing contract negotiations between PPL and the respondent telephone companies and force the respondents to enter into the form of joint use agreement proposed by PPL (Attachment "B" to the Complaint), rather than negotiating a mutually agreed-upon form of agreement to replace the current agreement, which PPL had unilaterally terminated.

9. The agreements for which PPL has noticed termination remain in effect for the time being, because the parties have mutually agreed to extend the termination dates so that the current agreements would remain in effect during the pendency of this proceeding. (Complaint ¶ 14-15).

10. PPL contends that negotiations for a new form of joint use agreement "have proved to be unsuccessful." (Complaint ¶ 17). According to the Complaint, PPL "has concluded that certain of the provisions" of the current joint use agreement "are

inequitable, inappropriate and/or ineffective” and that “an equitable resolution of each of [the] issues” over which the parties were negotiating “is essential to maintain orderly and coordinated joint pole sharing arrangements” between PPL and the respondents.

(Complaint ¶ 8 and 17).<sup>2</sup> It does not contend that the only possible “equitable” resolution of the disputed issues is the contract form it seeks to force on the respondents.

11. By way of relief, PPL asks the Commission to "order the Respondents to enter into the form of Amendment to Joint Use Agreements provided as Attachment ‘B’ hereto.” (Complaint, Wherefore Clause). PPL asserts that its form of contract is “fair and equitable to [PPL] and its customers as well as to Respondents and their customers.” (Complaint ¶ 20).<sup>3</sup>

12. PPL conceded that its preferred form of contract would provide PPL with “savings” of approximately \$12 million per year, (Complaint ¶41), the corollary of which of course means it would cost the respondents approximately \$12 million a year more than the freely-negotiated contracts that PPL just terminated. PPL further admits that its demanded form of contract also provides for additional penalties, fee increases and other burdens on respondents that are not included in the most recent freely-negotiated agreement. (Complaint ¶ 31, 32 and 35).

13. Verizon and the PTA respondents have each filed an Answer and New Matter in this proceeding on this date denying the material allegations of the Complaint, which are incorporated herein by reference.

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<sup>2</sup> Respondents do not agree with these assertions, as set forth in their Answers filed this date.

<sup>3</sup> Again, as set forth in their Answers, respondents disagree with this characterization and find PPL’s proposals to be inequitable, unreasonable and one-sided to the benefit of PPL, but it is not necessary to reach this factual dispute to address the Preliminary Objections.

**B. Legal Standard**

14. The Commission's regulations permit the filing of Preliminary Objections seeking dismissal of a complaint on various grounds, including lack of Commission jurisdiction and/or legal insufficiency of the pleading. 52 Pa. Code §5.101(a)(1) and (4). For purposes of disposition of such a motion, all well-pleaded material facts of the non-moving party must be accepted as true. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (Pa. 1977). The preliminary objection will be granted only if the moving party prevails as a matter of law. In evaluating the legal sufficiency of a complaint, however, conclusions of law, speculation and unwarranted inferences from the facts, argumentative allegations, and expressions of opinion are not considered to be admitted as true and, therefore, cannot support an otherwise deficient pleading. *Giffin v. Chronister*, 616 A.2d 1070, 1072 (Pa. Commw. Ct. 1992) (citing *Commonwealth, Department of Public Welfare v. Portnoy*, 129 Pa. Commonwealth Ct. 469, 566 A.2d 336, appeal granted, 525 Pa. 648, 581 A.2d 574 (1990)).

15. In this case, even accepting PPL's well-pleaded material facts as true, it is clear that the Commission lacks jurisdiction or authority to force the respondents to sign the form of contract that PPL demands simply because PPL has unilaterally concluded that the current contract is "inequitable, inappropriate and/or ineffective" and asserts that its new proposed contract terms would substantially benefit for PPL. Alternatively, PPL's allegations fail to state a claim upon which relief may be granted and the Complaint is therefore legally insufficient. Accordingly PPL's Complaint must be dismissed.

**C. The Commission Lacks Jurisdiction To Force Respondents To Sign PPL's Demanded Form Of Contract**

16. It is a bedrock principle of law that this Commission cannot exceed its jurisdiction and must act within it. *City of Pittsburgh v. Pa. PUC*, 595, 43 A.2d 348 (Pa. Super. 1945). As a creature of legislation, the Commission possesses only the authority the state legislature has specifically granted to it in the Public Utility Code. 66 Pa. C.S. §§ 101, et seq. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell*, 477 Pa. 1, 383 A.2d 791 (1977). *See also Allegheny County Port Authority v. Pa. P.U.C.*, 427 Pa. 562, 237 A.2d 602 (1967); *Behrend v. Bell of PA*, 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); *Pa. Department of Highways v. Pa. P.U.C.*, 198 Pa. Superior Ct. 87, 182 A.2d 267 (1962); *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978).

17. PPL's Complaint alleges no basis under the Public Utility Code to support the Commission's jurisdiction to interfere in ongoing negotiations over a new commercial agreement for joint use of poles and to order the respondent telephone companies to enter into a form of contract demanded by PPL.

18. In a vague and passing attempt to allege jurisdiction, PPL merely claims that its request is "entirely consistent with" unspecified portions of the Public Utility Code and "past practice." (Complaint ¶ 18). PPL's failure to allege any specific statutory provision to support jurisdiction renders its pleading defective on that basis alone.

19. With regard to "past practice," PPL cites only to a seventeen-year-old Commission decision addressing a dispute between PPL and North-Eastern Pennsylvania Telephone Company regarding the cost-sharing methodology to be included in a joint use

agreement. *North-Eastern Pennsylvania Telephone Co. v. Pennsylvania Power & Light Co.*, 1992 Pa. PUC LEXIS 68, Docket No. C-881953 (Opinion and Order entered June 9, 1992). That opinion did not address the basis under which the Commission could exercise jurisdiction over the disputed terms of the joint use agreement, and the parties appear not to have argued the issue of whether jurisdiction was either present or lacking. But jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). Even if the Commission acted in the *North-Eastern* case without discussing its basis for jurisdiction, such a precedent does not serve to confer jurisdiction where it is lacking here.

20. PPL fails to cite or recognize more recent Commission precedent on the issue making clear that the Commission does *not* have jurisdiction or authority to entertain a complaint in which one party seeks to force the other party to change a material provision of a freely-negotiated joint use agreement. *ALLTEL Pennsylvania, Inc. v. West Penn Power Company*, Docket No. C-00992532 (Opinion and Order entered July 26, 2001) ("*West Penn*").

21. As the Commission recognized in *West Penn*, the only possible basis to attempt to invoke Commission jurisdiction to revise or reform the terms of a joint use agreement is 66 Pa. C.S. 508, which provides:

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth. Whenever the commission shall determine, after reasonable notice and hearing, upon its own motion or upon complaint, that any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or

adverse to the public interest and the general well-being of this Commonwealth, the commission shall determine and prescribe, by findings and order, the just, reasonable, and equitable obligations, terms, and conditions of such contract.

22. PPL's Complaint contains no reference to Section 508. There is no claim made in the Complaint that the circumstances alleged meet the threshold test of Section 508, to invoke Commission jurisdiction.<sup>4</sup>

23. Even were PPL to have attempted to make a claim under Section 508, however, this provision does not provide a basis for Commission jurisdiction here. As an initial matter, Section 508 on its face only empowers the Commission to "vary, reform, or revise" an *existing* contract. Here, PPL admits that it has freely chosen to terminate the existing contract, and the parties have only mutually agreed to extend the termination date at their convenience. Respondents have no obligation to agree to any further extensions of the termination date under the terms of the existing contract, and PPL is not asking for an alteration to the termination provision – which it voluntarily invoked.

24. While PPL styles its newest contractual proposal as an "addendum" to the existing terminated contracts, it is effectively asking the Commission to direct the respondent telephone companies to enter into new joint use agreements with PPL to replace the soon-to-be-terminated agreements. Section 508 does not provide jurisdiction to force a party to enter into a new contract, but rather is limited to reforming existing contracts.

25. But even if PPL's demand could be viewed as a request to vary, reform or revise an existing contract under Section 508, that provision still does not confer jurisdiction under the facts alleged by PPL. Section 508 empowers the Commission to

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<sup>4</sup> Amendment of the Complaint would be required.

“vary, reform, or revise” certain public utility contracts if it finds that “any such obligations, terms, or conditions are unjust, unreasonable, inequitable, or otherwise contrary or adverse to the *public interest and the general well-being of this Commonwealth.*” 66 Pa. C.S § 508 (emphasis added). In *West Penn*, the Commission affirmed the ALJ’s holding that it lacked statutory authority under Section 508 to revise the termination provision in a joint use agreement because the change was not necessary to serve the public interest, but rather was driven by the private interests of one of the parties to have a more advantageous contract. *West Penn*, slip op. at 4. As the ALJ explained in *West Penn*, “adverse consequence to joint complainants does not equate” to “the public interest and the general well-being of this Commonwealth.” *West Penn* ID at 34.

26. Section 508 empowers the Commission to reform contracts where the “public interest” requires it – not to reform contracts to serve the purely private interests of one of the contracting parties.<sup>5</sup> Accordingly, as the ALJ held and the Commission affirmed in *West Penn*, an allegation that a provision of a joint use agreement is “undesirable, aesthetically displeasing, inefficient, or disadvantageous to the joint complainants” does not meet the statutory standard under Section 508. *West Penn*, at 8; *West Penn*, ID at 34. As the ALJ recognized in *West Penn*, it is a perfectly acceptable alternative for a party to choose to operate without a joint use agreement and to “construct and maintain [its] own facilities.” *West Penn*, ID at 34.

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<sup>5</sup> See *Middletown Twp. v. Pa. PUC*, 482 A.2d 674 (1984); *Joint Application, As Amended, of WorldCom, Inc., MCI Communications Corporation and MCImetro Access Transmission Services for the Approval to Transfer Control of MCI Communications Corporation to WorldCom, Inc.*, 1998 Pa. PUC LEXIS 28 (Opinion and Order entered June 18, 1998) (a private interest of one entity does not equate to the “public interest.”)

27. It is within respondents' managerial discretion to determine whether a new joint use agreement is desirable and appropriate, or whether it is preferable to operate without such an agreement and utilize available alternatives such as employing the common practice of making attachments by licenses or simply constructing their own facilities, instead of agreeing to PPL's demands. Section 508 does not empower the Commission to usurp that discretion with regard to whether or not to operate under a joint use agreement. *See, e.g., Metropolitan Edison Co. v. Pa. PUC*, 62 Pa. Commw. 460 (1981) (Commission may not interfere with lawful utility management decisions absent an abuse of discretion).

28. Here, PPL's allegations are no different in substance from the claims that the Commission found in *West Penn* were insufficient to support the exercise of Commission authority under Section 508. PPL merely alleges that the contracts at issue "affect the ownership and maintenance of public utility facilities," (Complaint ¶ 18) but does not allege that failure to force respondents to agree to the specific provisions demanded by PPL – as opposed to any other provisions the parties might freely negotiate – would be "contrary or adverse to the public interest and the general well-being of this Commonwealth." 66 Pa. C.S. § 508. It is clear that PPL's allegations that the current contracts are "inequitable, inappropriate and/or ineffective" (Complaint ¶ 8), and that it wishes to enter into new contracts with the provisions it describes, are driven by the impact on PPL's own private financial interests, most notably PPL's desire to "save" approximately \$12 million by shifting that financial responsibility to respondents under its proposed one-sided new fee structure. (Complaint ¶ 41).<sup>6</sup>

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<sup>6</sup> PPL's passing and speculative reference to the safety concerns of telephone company employees and the travelling public – by way of arguing for heftier penalty payments to PPL for allegedly non-

29. In short, the Commission does not have jurisdiction or authority under Section 508 to entertain a complaint seeking to alter the negotiated provisions of a contract (much less to force a new contract) simply to advance the financial interests of one of the parties – which is what the well-pleaded allegations of PPL’s Complaint demand here.<sup>7</sup>

30. Further, to the extent PPL is asking this Commission to replace the parties’ privately negotiated rates, terms and conditions for pole attachments with some sort of Commission-mandated fee structure, the Commission clearly lacks jurisdiction or authority to entertain such a request. Section 224 of the Communications Act, 47 U.S.C. § 224, establishes jurisdiction in the FCC to regulate pole attachments to ensure that they are reasonable. While states, at their option, may elect “reverse preemption” to regulate pole attachment rates instead of the FCC, any such state must first certify to the FCC that it has rules in place to carry out that task in a manner that considers the needs of customers of attaching parties and pole owners.<sup>8</sup> This Commission has never exercised this “reverse preemption” provision in order to issue its own pole attachment rates;

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compliant attachments under the contract – are insufficient to establish the circumstances necessary to trigger Section 508. (Complaint ¶¶ 24 and 29). However, even if they were sufficient to confer jurisdiction to consider reformation of the provisions for noncompliant attachments, there is no question that under *West Penn* PPL fails to support jurisdiction to consider reformation of the cost and fee or any other provisions of the existing contract or to force respondents to enter a new contract with PPL’s demanded fee terms shifting \$12 million in revenue from respondents to PPL.

<sup>7</sup> PPL may contend that during negotiations the PTA respondents (but not Verizon) consented to this Commission’s jurisdiction to consider unresolved issues from the negotiation. But any such alleged agreement would be immaterial. “It is hornbook law that . . . where subject matter jurisdiction does not exist, consent of the parties is incapable of conferring such jurisdiction.” *Hughes v. Pennsylvania State Police*, 619 A.2d 390, 393, 152 Pa. Commw. 409, 415 (Pa. Commw. Ct. 1992). See also *Roberts v. Martorano*, 427 Pa. 581, 235 A.2d 602 (1967). In any event, even though the parties could not confer subject matter jurisdiction on the Commission where it is lacking, at most the PTA discussed bringing unresolved issues before this Commission as a neutral third party. It cannot be argued that any respondent has consented to be a party to a complaint case where PPL is demanding to force the respondents to sign its preferred form of contract.

<sup>8</sup> 47 U.S.C. § 224(c)(2).

therefore, it has no jurisdiction to supplant the parties' privately negotiated contractual terms and replace them with Commission-mandated conditions.

31. Accordingly, PPL's Complaint should be dismissed preliminarily for lack of jurisdiction.

**D. The Complaint Should Be Dismissed As Legally Insufficient**

32. A Complaint before this Commission must allege "an act done or omitted to be done by a person subject to the jurisdiction of the Commission, in violation, or claimed violation of a statute which the Commission has jurisdiction to administer, or of a regulation or order of a Commission . . ." <sup>9</sup> The test as to the sufficiency of a complaint is whether the complaining party can prove facts legally sufficient to establish his or her right to relief. *Firing v. Kephart*, 353 A.2d 833, 835 (Pa. 1976); *Myers v. Ridge*, 712 A.2d 791, 794 (Pa. Commw. Ct. 1998).

33. PPL's Complaint fails to allege any violation by the respondents of any "statute," "regulation," or "order." On that basis alone it should be dismissed as legally insufficient.

34. As discussed above, PPL does not raise a Section 508 claim and even if it were to do so, Section 508 cannot, under the circumstances, empower the Commission to force respondents to enter into a new contract with PPL. This Commission has already held in *West Penn* that Section 508's statutory standard is not satisfied where, as here, the allegation is simply that the present contract terms are somehow disadvantageous to the interests of one of the contracting parties. *West Penn*, slip op. at 4, 8, 17; *West Penn* ID at 34. Accordingly, PPL's Complaint fails to state a claim under Section 508.

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<sup>9</sup> 52 Pa. Code § 5.21(a). See also 66 Pa. CS § 701.

35. While PPL's Complaint makes passing reference to safety concerns for telephone company employees and the travelling public, (Complaint ¶¶ 24 and 29), PPL does not attempt to invoke 66 Pa. C.S. § 1501 (conferring general authority over the safety and adequacy of utility service) as a basis for jurisdiction.<sup>10</sup> Even if it had cited that statutory provision, however, PPL's theoretical, speculative and argumentative statements, with no specific facts alleged, are insufficient to state any claim under Section 1501. *See Independence Blue Cross v. Pennsylvania Insurance Dep't*, 802 A.2d 715 (Pa. Commw. 2002) (a request to determine rights in anticipation of events which may never occur is insufficient to confer jurisdiction). Nor is the subject matter of employee and highway safety within the Commission's jurisdiction.

36. As the ALJ correctly held in *West Penn*, PPL as a private contracting party to soon-to-be-terminated joint use agreements with the respondents has only two choices here. It may either "attempt to negotiate new agreements with respondent[s]. Failing that [PPL and the respondents] are free to construct and maintain their own facilities," by operating without a joint use agreement for attachments going forward.<sup>11</sup> *West Penn* ID at 34. But nothing in the "public interest" supports the Commission's interference in the private contract negotiations to force one of the contracting parties to adopt the other party's preferred terms to provide PPL with a more financially advantageous contract. Accordingly, PPL's Complaint fails to state a claim upon which relief may be granted and should be preliminarily dismissed as legally insufficient.

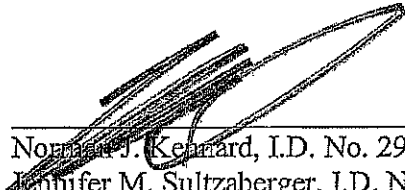
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<sup>10</sup> Again, if PPL wishes to include such a claim, its Complaint would have to be amended.

<sup>11</sup> The current agreement provides that following termination the terms of the agreement continue to govern existing attachments. (Complaint, Attachment A, Section 3.3). Thus, if the alternative is to operate without an agreement, it would only apply to future attachments.

WHEREFORE, for the reasons set forth above, respondents respectfully request that PPL's Formal Complaint be dismissed preliminarily.

Respectfully submitted,



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Date: September 24, 2009