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December 17, 2010

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VIA E-FILING and FIRST CLASS MAIL

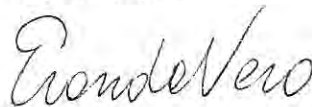
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17102

Re: James McHale v. Pennsylvania Power Company
Docket No. C-2010-2211805

Dear Secretary Chiavetta:

Enclosed for filing please find the Preliminary Objection on behalf of Pennsylvania Power Company in the above-captioned proceeding. Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,


Eranda Vero

EV/ck
Enclosures
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JAMES MCHALE

v.

PENNSYLVANIA POWER COMPANY

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Docket No. C-2010-2211805

NOTICE TO PLEAD

TO: James McHale
9609 N. Old Mill Way
Citrus Springs, Florida 34434

James McHale
7615 Eriez Drive
Jamestown, Pa 16134

Pursuant to 52 Pa. Code §§ 5.101(b), you are hereby notified that Pennsylvania Power Company has filed Preliminary Objections which you may answer within ten (10) days unless otherwise provided in Chapter 5 of Title 52 of Pennsylvania Code. Your failure to answer will allow the presiding officer to rule on the Preliminary Objection without a response from you, thereby requiring no further proof.

All pleadings such as a reply to this Preliminary Objection must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Metropolitan Edison Company.

Dated: December 17, 2010



Eranda Vero
John F. Povilaitis
RYAN, RUSSELL, OGDEN & SELTZER P.C.
800 North Third Street, Suite 101
Harrisburg, Pennsylvania 17102-2025
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Attorneys for
Pennsylvania Power Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JAMES MCHALE

v.

PENNSYLVANIA POWER COMPANY

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Docket No. C-2010-2211805

**PRELIMINARY OBJECTIONS OF PENNSYLVANIA POWER COMPANY
TO DISMISS THE COMPLAINT OF JAMES MCHALE**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, Pennsylvania Power Company (“Penn Power” or the “Respondent”), by and through its counsel, Eranda Vero, John F. Povilaitis and Ryan, Russell, Ogden and Seltzer PC, files these Preliminary Objections to the above-captioned Formal Complaint. Penn Power files these Preliminary Objections pursuant to Section 5.101 of the Pennsylvania Public Utility Commission’s (the “Commission”) regulations, 52 Pa. Code § 5.101(a)(1). In support thereof, Penn Power avers as follows:

I. Introduction

These Preliminary Objections request the dismissal of the Formal Complaint filed by James McHale (“Mr. McHale” or the “Complainant”) against Penn Power because the Complaint is based solely on the issues regarding the validity and scope of a right of way document and therefore fall outside of the jurisdiction of the Commission. The determination of the validity and scope of the right of way is a matter that is solely within the jurisdiction of the Pennsylvania Courts. In addition, to the extent that Mr. McHale’s prayer for relief constitutes a request for monetary damages, the Commission is not empowered to grant such a relief.

II. Background

1. On or about November 22, 2010, Mr. McHale filed a Formal Complaint with the Commission against Penn Power at the above docket. In his Complaint, Mr. McHale alleges that Company facilities located on or near his property, Lot 503R, Eriez Dr., Jamestown, PA 16134 (“the Premises”), are sited in violation with the Right of Way Agreement, dated October 9, 1964. See Complaint ¶¶ 4-5(iii-v and xix-xxi).

2. On November 24, 2010, the Complaint was served on Penn Power via First Class Mail.

3. Penn Power has filed an Answer and New Matter contemporaneously with these Preliminary Objections.

4. In its Answer and New Matter, Penn Power has produced a copy of the Right of Way Agreement entered into by and between the original owners of the Premises, Lake Shore Corporation, and Penn Power, dated October 9, 1964, which confirms the existence of Penn Power’s right of way through the Complainant’s property and which has been properly recorded at the Recorder of Deeds Office.

5. The Right of Way Agreement grants Penn Power

...the right, privilege and authority to enter upon, construct, operate, maintain, renew, and remove electrical facility for the transmission and distribution of electric energy, and the operation of telegraph and telephone lines, including, among other things, the necessary poles, wires, guys, anchors, brace poles and appurtenances thereunto belonging, upon, over, and/or under and across the plan of lots situated in S. Shenango Township, Crawford County, Pennsylvania....

Attached Exhibit 1.

6. Complainant does not deny the existence of the 1964 Right of Way Agreement, and in fact a copy of the document is attached to the Complaint. Rather, the Complainant seeks to challenge the scope and validity of the right of way. Specifically, the Complainant requests that the Commission order “Penn Power to conform with the right of way agreement and its spirit.” Complaint ¶¶ 4-5 (xxi).

III. Argument

A. The validity and scope of the right of way challenged by Complainant is a matter within the jurisdiction of the Pennsylvania Courts, not the Commission.

7. The Commission’s Rules of Administrative Practice and Procedure permit the filing of preliminary objections. Specifically, the Commission’s regulation at 52 Pa. Code § 5.101 permits a party to file a preliminary objection when the Commission lacks jurisdiction to adjudicate the issues raised in the complaint. 52 Pa. Code § 5.101(a)(1). In addition, Section 703 of the Code allows the Commission to dismiss a complaint if a hearing is not needed. 66 Pa. C.S. § 703(b).

8. Preliminary objections allowed by 52 Pa. Code § 5.101 are comparable to a demurrer in a civil case, which is authorized by Rule 107(b) of the Pennsylvania Rules of Civil Procedure. The Commission has adopted this standard. Application of Main Line Transit Service, Inc., Docket No. A-00116172, Final Order entered October 3, 2010.

9. The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No.

C-20066937 (Order entered May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pennsylvania Pub. Util. Comm'n.*, 43 A.2d 348 (Pa Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992) *alloc. denied* 637 A.2d 293 (Pa. 1993).

10. The Commission has determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. *Anne E. Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (Order entered July 3, 2003); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Order entered September 15, 1999). In *Fairview Water Co. v. Pennsylvania Pub. Util. Comm'n.*, 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission does not have jurisdiction to determine the scope and validity of an easement.

11. In *Boczar v. PPL Electric Utilities Corp.*, Docket No. C-20016332 (Order entered February 10, 2003), the complainant alleged that the utility was not authorized to place its poles, transformers and cable lines on his property. The Commission noted that the utility produced right of way agreements for the facilities in question and concluded that it was without jurisdiction to determine property rights concerning these easements. In *Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic Pennsylvania, Inc.*, Docket No. C-00945842 (Order entered October 25, 1995), the Commission stated that real property issues, such as trespass and

whether utility facilities were located pursuant to a valid easement are within the exclusive jurisdiction of the Courts of Common Pleas.

12. In *Messina v Bell Atlantic-Pennsylvania*, Docket No. C-00968225 (Order entered September 23, 1998), the Commission stated that it could adjudicate cases involving the existence rather than the scope and validity of an easement. In *Robert S.J. Nigro v. PPL Electric Utilities Corp.*, Docket No. C-00003242 (Order entered October 26, 2004), where the utility was unable to produce a written document granting an easement across the complainant's property and claimed an easement by prescription, the Commission concluded that it was without jurisdiction to determine prescriptive easements.

13. Finally, in *Stavnický v PPL Electric Utilities Corp.*, Docket No. C-20043368 (Order entered July 13, 2005), the Commission held that subject matter jurisdiction in right-of-way disputes extended only to cases where there was no written documentation of an easement. If the utility produced a document purporting to show a grant of authority for an easement concerning a complainant's property, the Commission's inquiry should be at an end. In that case, the Commission determined that it lacked jurisdiction because the utility presented written documentation of its easements.

14. In the present Complaint, Mr. McHale does not dispute the existence of Penn Power's right of way on the Premises. He essentially disputes the Company's interpretation and application of the terms of the Right of Way Agreement on his property.

15. As set forth above, the Commission has only asserted jurisdiction in cases disputing the existence of an easement rather than the scope and validity of one.

There is no factual dispute that a right of way¹ exists as both parties have attached copies of the 1964 Right of Way Agreement to their pleadings.

16. Because the Commission's jurisdiction does not extend to determining the scope or validity of an easement, the Commission cannot grant the relief requested by Complainant, i.e. that the Commission order "Penn Power to conform with the right of way agreement and its spirit." Complaint ¶¶ 4-5(xxi). As mentioned above, such jurisdiction is exclusively within the Courts of Common Pleas.

B. Complainant's claim for monetary relief should be dismissed because the Commission does not have jurisdiction to award money damages.

17. In his Complaint, Mr. McHale also requests that the Commission award him "remuneration for the tree kill...." Complaint ¶¶ 4-5(xxi). Complainant's requested relief constitutes a request for monetary damages.

18. It is well-established under Pennsylvania law that the enforcement powers of the Commission do not include the power to award money damages. *Elkin v. Bell*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791 (1978); see *Nagy v. Bell Tel. Co.*, 436 A.2d 701 (Pa. Super. 1981).

19. In *Feingold*, the Pennsylvania Supreme Court explained:

[T]he statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility. Nor can we find an express grant of power from which the power to award such damages can be fairly implied. Thus, it can be concluded that the Legislature did not intend for the PUC to have such a power.

Feingold, 383 A.2d at 794.

¹ A right of way is one of the primary recognized easements. See Black's Law Dictionary 548 (8th ed. 2004).

20. To the extent that the relief Mr. McHale requests in his Complaint constitutes a request for monetary damages, such a request is outside the Commission's jurisdiction.

IV. Conclusion

WHEREFORE, pursuant to the Commission's regulations at 52 Pa. Code § 5.101(a) (1), Pennsylvania Power Company requests that the Commission dismiss the Complaint of James McHale because the Commission lacks jurisdiction to determine the scope and validity of an easement, and because the Complainant requests monetary damages which the Commission is not empowered to grant.

Respectfully submitted,

Dated: December 17, 2010



Eranda Vero

John F. Povilaitis

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Harrisburg, Pennsylvania 17102-2025

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Docket No. C-2010-2211805

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the relevant documents in accordance with the requirements of 52 Pa. Code § 1.54 et seq. (relating to service by a participant).

Via First Class

James McHale
9609 N. Old Mill Way
Citrus Springs, Florida 34434

James McHale
7615 Eriez Drive
Jamestown, Pa 16134

Date: December 17, 2010



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