



JENNIFER M. (SULTZABERGER) CARON
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January 19, 2011

VIA E-FILING

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

In re: Travis Lasko v. Windstream Pennsylvania, LLC
Docket No. C-2010-2217869

Dear Secretary Chiavetta:

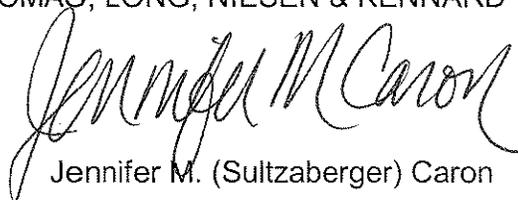
Enclosed for filing on behalf of Windstream Pennsylvania, LLC, is the original Preliminary Objections which was filed electronically this day in the above-referenced matter. The electronic filing receipt is attached. Copies of the Preliminary Objections are being served upon the persons and in the manner set forth on the Certificate of Service attached to it.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

THOMAS, LONG, NIESEN & KENNARD

By


Jennifer M. (Sultzaberger) Caron

Encl.

c: Certificate of Service
Jeanne Shearer

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Travis Lasko,
Complainant

v.

Windstream Pennsylvania, LLC,
Respondent

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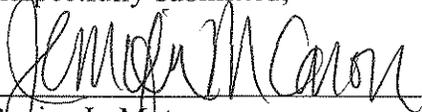
Docket No. C-2010-2217869

NOTICE TO PLEAD

To: Travis Lasko
566 Spang Avenue
Leechburg, PA 15656

You are hereby notified that, if you do not file a written response to Respondent's Preliminary Objections within ten (10) days from service of this notice, the facts set forth may be deemed to be true, without requiring 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 Windstream Pennsylvania, LLC.

Respectfully submitted,



Regina L. Matz
PA Attorney ID No. 42498
Jennifer M. Caron
PA Attorney ID No. 200993
THOMAS, LONG, NIESEN & KENNARD
212 Locust Street, Suite 500
Harrisburg, PA 17108-9500
(717) 255-7600

Attorneys for
Windstream Pennsylvania, LLC

Date: January 19, 2011

Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Travis Lasko,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2010-2217869
	:	
Windstream Pennsylvania, LLC,	:	
Respondent	:	

**PRELIMINARY OBJECTIONS
OF
WINDSTREAM PENNSYLVANIA, LLC**

TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, comes Windstream Pennsylvania, LLC, ("Windstream", "Company" or "Respondent"), Respondent herein, pursuant to 52 Pa. Code §5.101, by and through counsel, and files the within Preliminary Objections to the Complaint of Travis Lasko ("Complainant"), and in support thereof states as follows:

I. INTRODUCTION

1. Respondent's Answer and New Matter, which is being filed separately, is incorporated herein by reference.

2. Complainant has filed a Complaint against Windstream Pennsylvania, LLC, alleging that a utility pole was placed on private property without proper procedures, and that Complainant's request to remove the pole has been "ignored and overlooked." As relief, the Complainant asks for "compensation due for use of private land and any further use thereof."

3. As stated in further detail below, the utility pole in question was placed at its current location by West Penn Power Company or its predecessor(s) in 1927. Windstream has had facilities on the pole pursuant to a contract with the West Penn Power Company or its predecessor(s) since approximately 1966. Upon information and belief, the utility pole is necessary for telephone service, as it is used and useful in the provision of telephone service to Windstream customers.

II. PRELIMINARY OBJECTIONS

4. Complainant has failed to allege any act or thing done or omitted to be done by Respondents in violation, or claimed violation, of a statute which the Pennsylvania Public Utility Commission ("Commission") has jurisdiction to administer, or of a regulation or order of the Commission. 66 Pa.C.S. §701; 52 Pa. Code §§5.21(a) and 5.22(a)(5). Therefore, grant of these Preliminary Objections and dismissal of the Complaint is appropriate.

5. Respondent files these preliminary objections pursuant to Pursuant to 52 Pa. Code §§ 5.101(a)(1) and 5.101(a)(4). Respondent objects to Complainant's Complaint on the basis that the Commission lacks jurisdiction to award the relief Complainant seeks, and that the Complaint is legally insufficient.

6. Windstream established service to Complainant at the Spang Avenue account on January 25, 2010. Effective May 3, 2010, Complainant requested termination of service from Windstream. Accordingly, Complainant is no longer a customer of Windstream, and was not a customer at the time the Complaint was filed.

7. The utility pole in question was placed at its current location by West Penn Power Company or its predecessor(s) in 1927. Windstream has had facilities on the pole pursuant to a contract with the West Penn Power Company or its predecessor(s) since approximately 1966,

and has openly, continuously, and notoriously provided telephone service from the pole, or any replacement thereof, since that time.

8. The utility pole has been and remains necessary for the provision of telephone service to the public. Upon information and belief, the pole has been used and useful for the provision of telephone service to Complainant as well as to the prior owners/occupants of the property at 566 Spang Avenue. Finally, the pole is also used and useful and has been so used and useful to provide telephone service to other Windstream customers.

9. Even though Complainant is no longer a customer of Windstream, Respondent avers upon information and belief that the pole remains necessary for the provision of telephone service to Complainant by other providers unless other facilities necessary to originate and terminate service to the 566 Spang Avenue property are present. Further, even though Complainant is no longer a customer of Windstream, the pole remains necessary as it is used and useful for the provision of telephone service to other Windstream customers.

10. The pole is lawfully placed. As a public utility, Windstream has the statutory power of eminent domain for purposes of occupying private property for public purposes.¹ Windstream also has the statutory right to use public rights of way attendant streets, highways and other public places.²

11. A landowner of property abutting a public street takes that property subject to an easement of public use. Complainant has no right to use that right of way in any manner that is

¹ 15 Pa.C.S. §§1511(a) and (c).

² 15 Pa.C.S. §1511(e); 36 P.S. §670-411; 67 Pa. Code §459.1 *et seq.*

inconsistent with the public's use or interferes substantially with the public uses of the right of way.³

12. By acquiring the property over seven years ago with knowledge that it was burdened with the public use, Complainant cannot claim that his property today is burdened in a manner that did not exist at the time of his purchase.

13. Having been placed and used for public utility services openly, continuously, and notoriously since 1927 for electric service and 1966 for telephone service, Complainant's property is also subject to other prescriptive remedies such as a presumptive grant, prescriptive easement, or license.⁴

14. At the time of his purchase of the property over seven years ago, Complainant's property was already encumbered with a public use. Therefore, Complainant has no entitlement to any further compensation or any power to veto authorized public uses of the right of way.⁵

15. At the time of his purchase of the property over seven years ago, Complainant's property was already encumbered with a public use. Therefore, Complainant's Complaint is barred by the principles of estoppel and laches.

16. In his prayer for relief, Complainant requests relief in the form of payment of "any and all compensation due for use of private land and any further use thereof." However, the Commission does not have jurisdiction to award monetary damages. Rather, the

³ *Burnier v. Department of Environmental Resources*, 611 A.2d 1366 (Pa. Cmwlth. 1992) ("Burnier"); See also *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.2d 762 (3rd Cir. 1994); *Columbia Gas Transmission Corp. v. Tarbuck*, 845 F. Supp. 303 (W.D. Pa. 1994) *aff'd* 62 F.3rd 538; *Fortney v. Bell Telephone of Pennsylvania*, 407 A.2d 391 (Pa. Super. 1979).

⁴ *The Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc.*, 761 A.2d 139 (Pa. Super. 2000); *Coxe v. Lehigh Valley R. Co.*, 46 Luz.L.R.211 (1956); *Coxe v. Lehigh Valley R. Co.*, 158 A.2d 782 (Pa. 1960).

⁵ *Smith v. Adams*, 523 A.2d 788 (Pa. Super. 1987); *Pittsburgh National Bank v. Equitable Gas Co.*, 220 A.2d 12 (Pa. 1966).

Commission's authority is limited to the authority set forth in the Public Utility Code, which does not include the awarding of monetary damages.⁶

17. Because the Commission lacks jurisdiction to award damages as Complainant requests, Complainant's Complaint seeking reimbursement of damages or awarding of damages should be dismissed with prejudice.

18. The Complainant fails to allege a violation of a statute, regulation or order of the Commission that would entitle Complainant to a hearing in this matter. The Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. Section 5.21(d) reads, in pertinent part:

(d) The filing of a formal complaint entitles the complainant to a formal hearing before the Commission except that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest.

52 Pa. Code §5.21(d)

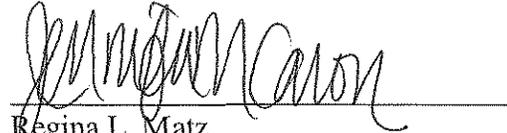
III. CONCLUSION

20. Complainant has failed to allege any act or thing done or omitted to be done by Respondent in violation, or claimed violation, of a statute which the Pennsylvania Public Utility Commission has jurisdiction to administer, or of a regulation or order of the Commission. Furthermore, Complainant's claim is barred by estoppel and laches.

⁶ 66 Pa.C.S. §501 *et seq.*; See *Elkin v. Bell Tel. Co.*, 491 Pa. 123, 420 A.2d 371 (1980).

WHEREFORE, Windstream Pennsylvania, LLC, for the reasons set forth herein,
respectfully prays that the instant complaint be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Regina L. Matz", is written over a horizontal line.

Regina L. Matz
PA Attorney ID No. 42498
Jennifer M. Caron
PA Attorney ID No. 200993

Attorneys for
Windstream Pennsylvania, LLC

THOMAS, LONG, NIESEN & KENNARD
212 Locust Street, Suite 500
Harrisburg, PA 17108-9500
(717) 255-7600

Dated: January 19, 2011

AFFIDAVIT

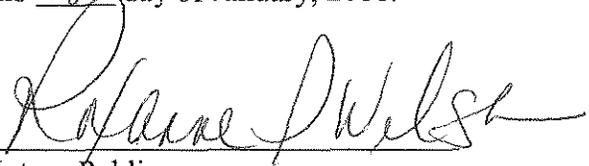
COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF LANCASTER :

JEANNE SHEARER, being duly sworn according to law, deposes and says that she is Vice President for State Government Affairs of Windstream Pennsylvania, LLC, and that in this capacity she is authorized to and does make this Affidavit, and that the facts set forth in the Preliminary Objections are true and correct to the best of her knowledge, information and belief.



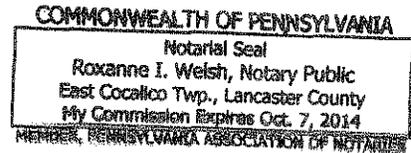
Jeanne Shearer
Vice President, State Government Affairs

Sworn to and subscribed before me
this 18th day of January, 2011.



Notary Public

(SEAL)



BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

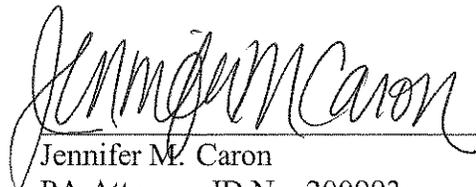
Travis Lasko,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2010-2217869
	:	
Windstream Pennsylvania, LLC,	:	
Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of January, 2011, served a true and correct copy of the foregoing Preliminary Objections and Notice to Plead on behalf of Windstream Pennsylvania, LLC, upon the persons and in the manner listed below:

FIRST CLASS MAIL, POSTAGE PREPAID

Travis Lasko
566 Spang Avenue
Leechburg, PA 15656



Jennifer M. Caron
PA Attorney ID No. 200993