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July 13, 2011

VIA FEDEX NEXT DAY

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

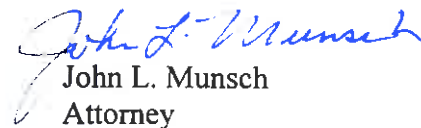
Re: Travis Lasko v. West Penn Power Company
Complaint Docket No. C-2010-2217829

Dear Secretary Chiavetta:

Enclosed is an original and three (3) copies of the **Motion for Judgment on the Pleadings** by West Penn Power Company in the above-captioned Complaint, with certificate of service attached.

This filing is filed by FedEx Next Day delivery and electronically and is deemed filed today.

Very truly yours,


John L. Munsch
Attorney

JLM:jss

Enclosures

cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

TRAVIS LASKO	:	
Complainant,	:	
	:	
v.	:	Complaint Docket No. C-2010-2217829
	:	
WEST PENN POWER COMPANY,	:	
Respondent.	:	

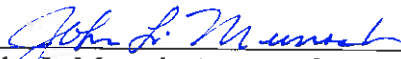
NOTICE TO PLEAD

To: Travis Lasko
566 Spang Avenue
Leechburg, PA 15656

You are hereby notified that you have twenty (20) days from the date of service of this Motion for Judgment on the Pleadings to file a written response. All pleadings such as a Response to the Motion for Judgment on the Pleadings must be filed with the Secretary of the Public Utility Commission, with a copy served on the undersigned counsel for West Penn Power Company.

Date: July 13 , 2011

Respectfully submitted,



John L. Munsch, Attorney for
WEST PENN POWER COMPANY
800 Cabin Hill Drive
Greensburg, PA 15601
(724) 838-6210
Pa. I.D. No. 31489

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

TRAVIS LASKO	:	
Complainant,	:	
	:	
v.	:	Complaint Docket No. C-2010-2217829
	:	
WEST PENN POWER COMPANY,	:	
Respondent.	:	

West Penn Power Company’s Motion for Judgment on the Pleadings

West Penn Power Company (West Penn) files a Motion for Judgment on the Pleadings pursuant to 52 Pa. Code §5.102 and in support thereof states as follows:

I. Introduction

1. Complainant filed a Complaint against West Penn on or about December 15, 2010, contending that a single utility pole owned by West Penn was unlawfully situated on his property, that the pole was interfering with the construction of a new garage by the Complainant, and that the pole should be removed. West Penn filed its Answer on January 18, 2011, stating that West Penn’s pole in question has been in place since 1927, that the pole is necessary for the provision of electric service, and that the pole is lawfully situated.

2. West Penn also stated in its Answer that “to the extent that Complainant’s dispute entails property issues the Company points out that jurisdiction may rest with the Court of Common Pleas.” West Penn Answer Paragraph No. 4.

3. At the time of his Complaint against West Penn, the Complainant also filed a Complaint with the Commission against Windstream Pennsylvania, LLC, a telephone company subject to Commission jurisdiction. The Complaint against Windstream is found at Commission Docket No. C-2010-2217869. The Complaint against Windstream involved the same facts as the

Complaint against West Penn. The Complainant alleged that Windstream facilities located on West Penn's pole and located on Complainant's property were unlawfully situated and should be moved.

4. Windstream filed Preliminary Objections contending, among other things,¹ that the Complaint was outside the jurisdiction of the Commission. In an "Initial Decision Sustaining Preliminary Objections and Dismissing Complaint," dated February 14, 2011, Administrative Law Judge David A. Salapa sustained the Preliminary Objection filed by Windstream and dismissed the Complaint with prejudice. The Initial Decision concluded that "[t]he 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..." citing Fairview Water Co. v. Pennsylvania Pub. Util. Comm'n., 502 A. 162 (Pa. 1985). Initial Decision p. 6.

5. The Commission adopted the ALJ Salapa's Initial Decision in a Final Order entered April 1, 2011. Copies of the Initial Decision and Final Order are attached to this Motion for Judgment on the Pleadings.

II. Motion for Judgment on the Pleadings

6. The facts underlying the Windstream decision and the present case are essentially the same. The two Complaints involve the same West Penn-owned utility pole with Windstream's telephone facilities also attached to the pole. The Complaint challenges the legal authority and property rights of West Penn to maintain its pole on Complainant's property. As such, the Commission does not have jurisdiction to determine the validity of the easement because jurisdiction over the controversy is solely within the courts of general jurisdiction.

¹ Windstream also raised Preliminary Objections that the pole in question had been in place openly, continuously and notoriously since 1927 and was, therefore, lawfully situate pursuant to doctrines of presumptive grant, prescriptive easement, or license. The Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc., 761 A.2d 139 (Pa. Super. 2000).


7. The Commission has only those powers and authority expressly delegated to it by the General Assembly. Rogoff v. Buncher Company, 395 Pa. 477, 151 A.2d 162 (1985). The Pennsylvania Supreme Court has held that the Commission does not have jurisdiction to determine the scope and validity of easements. Fairview Water Co. The Commission has recognized the limitation of its jurisdiction over property disputes and has determined that it is not the proper forum for resolving property rights controversies. Anne E. Perrige v. Metropolitan Edison Co., Docket NO C-00004110 (Order entered July 3, 2003); David Lowry v. Duquesne Light Company, 2007 Pa. PUC Lexis 20 (C-20066074, January 10, 2007).

III. Conclusion

8. The Complainant's controversy concerning West Penn's property rights is not within the Commission's jurisdiction. The Commission dismissed the Complainant's Complaint against Windstream, based on the same facts, because the controversy was not with the Commission's jurisdiction. The Complaint against West Penn should also be dismissed.

WHEREFORE, West Penn Power Company respectfully requests that its Motion for Judgment on the Pleadings be granted and that the instant Complaint be dismissed.

Date: July 13, 2011

By: 
John L. Munsch, Attorney for
WEST PENN POWER COMPANY
800 Cabin Hill Drive
Greensburg, PA 15601
(724) 838-6210
Pa. I.D. No. 31489

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Travis Lasko	:	
	:	
v.	:	C-2010-2217869
	:	
Windstream Pennsylvania, LLC	:	

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTIONS AND DISMISSING
COMPLAINT**

Before
David A. Salapa
Administrative Law Judge

HISTORY OF THE PROCEEDING

On December 29, 2010, Travis Lasko (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Windstream Pennsylvania, LLC (Respondent). At paragraph 4B of the complaint form, requesting the facts of the complaint, the complaint simply states that a utility pole was placed on the Complainant's property "without proper procedures". The complaint alleges that, in 2003 the Complainant requested that the Respondent remove the pole. The complaint alleges that the Respondent ignored the Complainant's request.

At paragraph 5 of the complaint form, requesting how the Complainant wants the complaint resolved, the Complainant requests that the Commission order the Respondent to pay him "any and all compensation due for use of private land and any further use thereof."

The Respondent filed an answer with new matter and a preliminary objection on January 19, 2011. The answer admits that the Complainant had an account with the Respondent

for the address set forth in the complaint. The answer admits that a utility pole is located at the address set forth in the complaint. The answer denies that the utility pole was placed at the address improperly. The answer further denies that the utility pole was placed at the address during the Complainant's occupancy. The answer alleges that the Commission lacks the authority to grant the relief requested in the complaint.

The new matter asserts that the Respondent established service to the Complainant on January 25, 2010 and on May 3, 2010, the Complainant requested that the Respondent terminate his service. Therefore, according to the new matter, the Complainant was not a customer of the Respondent when he filed his complaint with the Commission.

The new matter further alleges that the utility pole that is the subject of the complaint was installed by West Penn Power Company or its predecessors in 1927. The Respondent placed its facilities on the utility pole in approximately 1996, pursuant to an agreement with West Penn Power Company. The new matter asserts that the utility pole is lawfully placed on the Complainant's property and that its facilities are lawfully placed on the utility pole. According to the new matter, the utility pole remains necessary for providing telephone service to the public. The answer with new matter requests that the Commission dismiss the complaint with prejudice.

The preliminary objections contend that the complaint fails to allege that the Respondent has violated any provision of the Public Utility Code or Commission regulations. Therefore, according to the preliminary objections, the Commission lacks jurisdiction to award the relief sought by the Complainant and the complaint is legally insufficient.

The preliminary objections point out that West Penn Power Company placed the utility pole in its current location prior to the Complainant purchasing the property. By acquiring the property with the knowledge that the property was burdened with pole, the preliminary objections argue that the Complainant cannot argue that the property is burdened in a manner that did not exist at the time of his purchase. The Complainant is therefore not entitled to any further compensation due to the location of the utility pole. The preliminary

objections also assert that the Commission lacks the authority to award monetary damages. The preliminary objections request that the Commission dismiss the complaint with prejudice.

By notice dated February 8, 2011, the Commission notified the parties that it had assigned the case to me as motion judge. As of the date of this decision, the Complainant has not filed an answer to either the Respondent's new matter or its preliminary objections. The preliminary objections are ready for decision. For the reasons set forth below, I will sustain the preliminary objections and dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Travis Lasko.
2. The Respondent in this case is Windstream Pennsylvania, LLC.
3. On December 29, 2010, the Complainant filed a complaint with the Commission against the Respondent.
4. The Respondent filed an answer with new matter on January 19, 2011.
5. On January 19, 2011, the Respondent filed preliminary objections.
6. The Complainant did not file an answer to either the new matter or the preliminary objections.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. 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.

Here the Respondent's preliminary objections assert lack of Commission jurisdiction pursuant to 52 Pa. Code §5.101(a)(1) and legal insufficiency of the complaint pursuant to 52 Pa. Code. §5.101(a)(4). I will first address the preliminary objection alleging that the Commission lacks jurisdiction over the complaint.

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) A preliminary objection asserting lack of Commission jurisdiction pursuant to the Commission's Rules of Practice and Procedure is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment 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 follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988)

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A. 2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988) The Commission must view the complaint in this case in the light most favorable to the Complainant and should dismiss the complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994)

The Commission regulation at 52 Pa. Code §5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa. Code §5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa. Code §5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa. Code §5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. §703(a); Lehigh Valley Power Committee v. Pennsylvania Pub. Util. Comm'n., 563 A.2d 557 (Pa. Cmwlth. 1989); Lehigh Valley Power Committee v. Pennsylvania Pub. Util. Comm'n., 563 A.2d 548 (Pa. Cmwlth. 1989); S.M.E. Bessemer Cement, Inc. v. Pennsylvania Pub. Util. Comm'n., 540 A.2d 1006 (Pa. Cmwlth. 1988); White Oak Borough Authority v. Pennsylvania Pub. Util. Comm'n., 103 A.2d 502 (Pa. Super. 1954)

Viewing the complaint in this case in the light most favorable to the Complainant, the complaint alleges that the Respondent improperly placed a utility pole on the Complainant's property. The Complainant requested that the Respondent remove the utility pole and the Respondent refused to do so. The Complainant requests that the Commission order the Respondent to compensate him for the use of his property.

Accepting the facts alleged in the complaint as true for purposes of disposing of its preliminary objection, the Respondent alleges that the complaint raises issues that are outside the subject matter jurisdiction of the Commission. I agree.

The complaint alleges that the Respondent lacks the legal authority to locate the utility pole on his property. Assuming for purposes of deciding the preliminary objection that the Respondent installed the utility pole in question, the allegations in the complaint challenge the validity of the Respondent's easement. The Commission has no jurisdiction to determine the validity of the easement. Such a determination is solely within the jurisdiction of the courts of the Commonwealth.

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. Cmwlt. 1992) alloc. denied 637 A.2d 293 (Pa. 1993)

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.

Accepting as true all the facts alleged in the complaint, the Complainant is not entitled to relief as a matter of law. The Complainant is alleging that the Respondent placed a utility pole on his property “without proper procedures”. It is reasonable to infer from this language that the Complainant is alleging that the Respondent has no legal right to have its facilities located on his property. This inference is supported by the Complainant’s request for compensation for the use of his property. Since the Commission’s jurisdiction does not extend to determining the validity of an easement, I will sustain the preliminary objection.

Since I have determined that the Commission lacks subject matter jurisdiction over the complaint, it is unnecessary for me to discuss the Respondent’s second preliminary objection challenging the legal insufficiency of the complaint. I will enter the following order.

CONCLUSIONS OF LAW

1. The Commission has no jurisdiction to determine the scope or validity of an easement.
2. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2010-2217869 is dismissed with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by Windstream Pennsylvania, LLC at Docket No. C-2010-2217869 is sustained.

2. That the complaint of Travis Lasko at Docket No. C-2010-2217869 against Windstream Pennsylvania, LLC is dismissed with prejudice for lack of jurisdiction.

3. That the record at Docket No. C-2010-2217869 is marked closed.

Date: February 14, 2011

David A. Salapa
Administrative Law Judge

PENNSYLVANIA {PRIVATE }
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Travis Lasko

v.

Windstream Pennsylvania, LLC

:
:
:
:
:
:

C-2010-2217869

FINAL ORDER

In accordance with the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. §332(h), the decision of Administrative Law Judge David A. Salapa dated February 14, 2011, has become final without further Commission action;

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by Windstream Pennsylvania, LLC at Docket No. C-2010-2217869 is sustained.
2. That the complaint of Travis Lasko at Docket No. C-2010-2217869 against Windstream Pennsylvania, LLC is dismissed with prejudice for lack of jurisdiction.
3. That the record at Docket No. C-2010-2217869 is marked closed.

BY THE COMMISSION,



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ENTERED: April 1, 2011

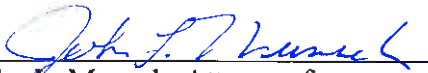
Pennsylvania Public Utility Commission;
Re: Travis Lasko v. West Penn Power Company; Docket No. C-2010-2217829

CERTIFICATE OF SERVICE

I hereby certify that I have this day served by first-class mail, postage prepaid, the foregoing
Motion addressed as follows:

Travis Lasko
566 Spang Ave.
Leechburg, PA 15656

Date: July 13, 2011


John L. Munsch, Attorney for
WEST PENN POWER COMPANY
800 Cabin Hill Drive
Greensburg, PA 15601
(724) 838-6210