



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

April 5, 2013

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

RE: **Docket No. C-2012-2330567**

Dear Secretary Chiavetta:

Enclosed for filing please find the one copy of the Department's *Brief in Response to Preliminary Objections*, in the above-captioned matter.

I hereby certify that a copy has been sent to all parties of record as indicated by the Certificate of Service.

Very truly yours,

A handwritten signature in blue ink that reads "Gina M. D'Alfonso".

Gina M. D'Alfonso
Assistant Counsel in Charge

Enclosure

220/GMD:aca

cc: Ember S. Jandebour, Administrative Law Judge
Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Rodney O. Rehnert, District Grade Crossing Engineer, District 5-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CITY OF POTTSVILLE	:	Complaint Docket
Complainant	:	No: C-2012-2330567
	:	
v.	:	
	:	Electronically Filed
READING BLUE MOUNTAIN &	:	
NORTHERN RAILROAD,	:	
SCHUYLKILL COUNTY,	:	
PENNDOT	:	
Respondents	:	

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF
TRANSPORTATION’S BRIEF IN RESPONSE TO PRELIMINARY OBJECTIONS**

AND NOW, comes the Commonwealth of Pennsylvania, Department of Transportation (“Department”), by and through its counsel, Gina M. D’Alfonso, Assistant Counsel in Charge, in accordance with the March 15, 2013, Briefing Order Regarding Preliminary Objection and 52 Pa. Code §§ 5.501 and 5.502, files its Brief in Response to Reading Blue Mountain and Northern Railroad’s (“Reading”) Preliminary Objection alleging lack of jurisdiction:

I. Statement of the case

On or about October 12, 2012, the City of Pottsville (“City”) filed a Railway Formal Complaint against Reading alleging safety concerns of a public utility facility. Specifically, the City alleged that: “[The] Railroad has continued to fail to replace and/or repair pedestrian guide rails along their property on South Center Street in the City since 2009. Said condition threatens the safety and welfare of pedestrians using the sidewalk along their property.” Complaint ¶ 3. The City has requested that the Pennsylvania Public Utility Commission (“Commission”) order Reading to replace or replace the guide rail. Complaint ¶ 4.

On November 13, 2012, the Department filed its answer in response to the complaint and alleged that the guide rail and/or railroad facilities in question run adjacent to a local road, South Centre Street, owned and operated by the City. Department Answer ¶ 3.

On or about November 21, 2012,¹ Reading filed Preliminary Objections in response to the Complaint alleging that the Commission lacked jurisdiction to adjudicate this matter, Preliminary Objections ¶ 9, and requesting that the Complaint be dismissed. Reading alleges that the Complaint arises from a disagreement between the City and Reading regarding an agreement to perform repairs to a wall running adjacent to Reading's property. Reading Brief in Support page 1.

II. Question Presented

The primary issue is whether the Commission has jurisdiction over the Respondent, Reading, pursuant to 66 Pa.C.S. § 1501, when the Complaint alleges disrepair of a certain pedestrian guide rail along the Railroad's property adjacent to the Complainant's road.

III. Summary of the Argument

Reading failed to comply with the Commission's Regulations governing the filing of preliminary objections. As such, no response is needed and Reading's Preliminary Objections should be denied as untimely filed. If the Preliminary Objections are not denied, then the facts on the record must be reviewed to determine if there are sufficient facts upon which to base a ruling. If it is determined that there are insufficient facts on the record for a ruling upon Reading's Preliminary Objections an evidentiary hearing could be held to establish sufficient evidence to rule upon the Commission's jurisdiction under 66 Pa.C.S. § 1501. In lieu of an evidentiary hearing, the City can be directed to amend its Complaint to set forth sufficient allegations of fact

¹ The Department received a copy of Reading's Preliminary Objections on December 21, 2012, despite the Certificate of Service indicating that the same had been mailed on November 15, 2012.

establishing the Commission's jurisdiction. This would render Reading's Preliminary Objections to the current Complaint moot. Case law supports either method of resolving factual dispute and/or insufficiency.

IV. Argument

a. Reading's Preliminary Objections should be dismissed for failure to comply with the Commission's Regulations.

Reading's Preliminary Objections fail to comply with the Commission's Regulations found at 52 Pa. Code §§ 5.61 and 5.101. Any responsive pleadings to a complaint filed with the Commission "shall be filed with the Commission within 20 days after the date of service." 52 Pa. Code § 5.61(a). Reading was served with the Formal Complaint in this matter on October 23, 2012. The twenty (20) day period ended on November 15, 2012. 52 Pa. Code §§ 1.12 and 1.56(b) (allowing an additional three (3) days for service by US First-Class Mail). Reading filed its Preliminary Objections with the Commission on November 21, 2012, as is indicated by the United States Postal Service stamp on the accompanying envelope which is filed with the Commission. 52 Pa. Code § 1.11(a)(3). As such, Reading's Preliminary Objections should be denied as untimely.

Additionally, Reading has failed to comply with the Commission's Regulations by failing to attach a "Notice to Plead" as required by 52 Pa. Code § 5.101. The Commission's Regulations state that: "[p]reliminary objections *must be accompanied by a notice to plead*" and "[a] preliminary objection *must contain a notice to plead* which states that an answer to the objection shall be filed within 10 days of the date of service of the objection." 52 Pa. Code § 5.101 (emphasis added). Reading failed to attach a "Notice to Plead" to its Preliminary Objection as received by the Department and as filed at the Commission. As such, the Department requests

that the Commission deny Reading's Preliminary Objections based upon its failure to comply with the Commission's Regulations as cited above.

- b. An evidentiary hearing or an amended complaint which pleads sufficient facts to form the basis of the Commission's jurisdiction under 66 Pa.C.S. § 1501 could resolve any factual disputes.**

If Reading's Preliminary Objections are not dismissed, then the issue becomes whether or not there are sufficient facts before the Commission to rule on the Preliminary Objections. "In deciding preliminary objections, the Commission must determine whether, based upon well-pleaded factual averments of the Petitioners, recovery or relief is possible. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. 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." *Macura v. West Penn Power Company*, 2012 Pa. PUC LEXIS 1702, *3-*4 (Initial Decision November 19, 2012) (citations omitted). Any existing dispute of fact or the insufficiency of fact could be remedied in one of two ways: hold an evidentiary hearing or require the Complainant to amend its Complaint to allege a sufficient factual basis and dismiss Reading's Preliminary Objections as moot.

The City alleges in its Complaint that: "[The] Railroad has continued to fail to replace and/or repair pedestrian guide rails along their property on South Center Street in the City of Pottsville since 2009. Said condition threatens the safety and welfare of pedestrians using the sidewalk along their property." Complaint ¶ 3. The Commission's jurisdiction in this matter depends on whether or not the Complaint sufficiently alleges that Reading has violated 66 Pa.C.S. § 1501 which states:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public.

66 Pa.C.S. § 1501. Therefore, the Complainant must allege that: (1) Reading is a public utility under Section 1501; (2) the guide rails constitute facilities of Reading; and (3) that Reading has failed to maintain its facilities in an “adequate, efficient, safe, and reasonable” manner. *Id.*

It is undisputed that a railroad is a public utility within the meaning of the Public Utility Code. 66 Pa.C.S. § 102. The remaining issues in this matter involve questions of fact: (1) the location of guide rail; (2) whether or not said guide rail is a railroad facility; and (3) the sufficiency of Reading’s maintenance of its facilities. Within the context of the Public Utility Code, a “facility” is defined as:

All the plant and equipment of a public utility, including all tangible and intangible real and personal property *without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility.*

66 Pa.C.S. § 102 (emphasis added). The meaning of “facility” within the context of § 1501 is to be “broadly construed.” *Cnty. Place Waste Treatment Co. v. Pa. Pub. Util. Comm’n*, 654 A.2d 72, 76 (Pa. Commw. Ct. 1995). The Complainant must demonstrate that the guide rail is in “any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with” the railroad and that Reading has failed to adequately maintain the same. 66 Pa.C.S. § 102. These are solely questions of fact.

The Commission’s practice in regards to preliminary objections is similar to that of Pennsylvania civil practice. *Equitable Small Transp. v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69 (Commission Opinion and Order, July 18, 1994). When the objecting party seeks dismissal of

the case by means of the preliminary objection the court should only grant the preliminary objections “where the dismissal is clearly warranted and free from doubt.” *Interstate Traveller Servs., Inc. v. Pa.*, 406 A.2d 1020, 1022 (Pa. 1979). This standard is applicable in Commission proceedings. *Montague v. Phila. Elec. Co.*, 1988 Pa. PUC LEXIS 299 (Initial Decision, January 6, 1988).

For the purposes of the disposition of preliminary objections, the Commission must take “[f]acts that are well-pleaded and material will be considered as true, together with such reasonable inferences as may be drawn from them.” *Drain v. Covenant Life Ins.*, 712 A.2d 273, 275 (Pa. 1998) citing *Am. Hous. Trust v. Jones*, 696 A.2d 1181, 1183-84 (Pa. 1997). The Commission may not rely upon the factual assertions of the objecting party. *Cnty. of Allegheny v. Pa.*, 490 A.2d 402, 408 (Pa. 1985) (“The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer”). “The preliminary objection may be granted only if the moving party prevails as a matter of law.” *Richmond v. PECO Energy Co.*, 2011 Pa. PUC LEXIS 545, *5 (Commission Opinion and Order, December 7, 2011) citing *Rok v. Flaherty*, 527 A.2d 211 (Pa. Commw. Ct. 1987). If the Commission has any doubt, then the preliminary objections should be denied. *Sattar v. Aqua Pa., Inc.*, 2012 Pa. PUC LEXIS 1125, *6 (Commission Opinion and Order, July 19, 2012) citing *Dep’t of Auditor Gen. v. State Emps. Ret. Sys.*, 836 A.2D 1053, 1064 (Pa. Commw. Ct. 2003). See *Bilt-Rite Contractors, Inc. v. Architectural Studio*, 866 A.2d 270, 274 (Pa. 2005). See also *Montague*, 1988 Pa. PUC LEXIS 299, *5-*6 (upon a preliminary objection, the Commission follows the standard set forth in civil practice that “a Complaint is dismissed only where such dismissal is clear and free from all doubt”).

“[T]he primary focus is on the Complainant’s pleadings.” *SBG Mgmt. Servs., Inc. v. Phila. Gas Works*, 2012 Pa. PUC LEXIS 1713, *8 (Initial Decision, November 1, 2012). In the present case, the only facts which have been presented by the Complainant are contained within its only pleading, the Complaint. If no issues of fact have been raised, then the Commission may rule upon the preliminary objections as a matter of law. *Gould, Inc. v. Cont’l Cas. Co.*, 585 A.2d 16, 17 (Pa. Super. Ct. 1991). This occurs when either all facts are admitted, or otherwise not in dispute, or when the preliminary objections only dispute a question of law.²

However, in this case there are questions of fact and law. Reading has alleged that the Commission lacks jurisdiction to adjudicate the present claim.³ This necessarily raises questions of fact. The Pennsylvania Supreme Court has stated that “[w]hen factual issues are created on preliminary objections, the trial court should resolve the dispute by receiving evidence thereon through interrogatories, depositions or an evidentiary hearing.” *Luitweiler v. Northchester Corp.*, 319 A.2d 899, 902 (Pa. 1974).

If there are not sufficient facts on the record to support a ruling on Reading’s Preliminary Objections, then an evidentiary hearing to develop the facts necessary to determine whether the Commission’s jurisdiction in this matter is warranted. In the alternative, the Complainant can be ordered to amend its complaint to more sufficiently plead the necessary facts to establish the cause of action and/or the Commission’s jurisdiction. *See, e.g., Richman*, 2011 Pa. PUC LEXIS 545; *Colosimo v. Pa. Power Co.*, 2011 Pa. PUC LEXIS 322 (Initial Decision,

² This would occur if Reading had objected on the grounds of 52 Pa. Code §§ 5.101(2) or (3) (failure of pleading to conform or insufficient specificity of a pleading). In either case, the preliminary objections would solely raise issues as a matter of law.

³ Additionally, it is important to note that, as a matter of civil practice, when the objecting party fails to include a “Notice to Plead,” all facts contained therein are deemed to have been denied by the non-objecting party despite the failure to file a responsive pleading. *Greene v. Liebergott*, 344 A.2d 501, 502 (Pa. Super. 1975); *see* Pa. R. Civ. P. 1026 and 1029(d) (“no pleading need be filed unless the preceding pleading contains a notice to defend or is endorsed with a notice to plead” and “averments in a pleading to which no responsive pleading is required shall be deemed to be denied”); *see also* 52 Pa. Code § 5.101(b) (“preliminary objection must contain a notice to plead which states that an answer to the objection shall be filed within 10 days of the date of service of the objection”).

October 19, 2011); *Silvestri v. Verizon Pa. Inc.*, 2011 Pa. PUC LEXIS 1764 (Commission Opinion and Order, July 1, 2011); and *Elliott v. PECO Energy Co.*, 2010 Pa. PUC LEXIS 1475 (Initial Decision, August 19, 2010).

c. Reading's legal argument is misplaced.

Reading cites *Country Place* to support its position that the Commission lacks jurisdiction. However, this case is inapposite to Reading's stated legal position. In *County Place*, the Complainant brought an action against a sewage treatment plant under 66 Pa.C.S. § 1501 alleging both inadequate water pressure and that offensive odors were coming from the respondent's sewage plant. 654 A.2d at 73. The Administrative Law Judge and the Commission both held that jurisdiction was proper under § 1501. The Commonwealth Court disagreed and held that the Commission cannot regulate odors even when produced by facilities owned and operated by a public utility. *Id.* at 76. The Court based its decision on the fact that odor is beyond the definition of "service" or facility" as used in § 1501.⁴ Additionally, the Court held that the General Assembly chose to vest authority to regulate air pollution with the Department of

⁴ Section 102 of the Public Utility Code defines "facilities" and "service" as follows:

"Facilities." All the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility. Property owned by the Commonwealth or any municipal corporation prior to June 1, 1937, shall not be subject to the commission or to any of the terms of this part, except as elsewhere expressly provided in this part.

"Service." Used in its broadest and most inclusive sense, includes any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them, but shall not include any acts done, rendered or performed, or any thing furnished or supplied, or any facility used, furnished or supplied by public utilities or contract carriers by motor vehicle in the transportation of voting machines to and from polling places for or on behalf of any political subdivision of this Commonwealth for use in any primary, general or special election, or in the transportation of any injured, ill or dead person, or in the transportation by towing of wrecked or disabled motor vehicles, or in the transportation of pulpwood or chemical wood from woodlots.

Environmental Resources, 35 P.S. § 4004, including “noxious or obnoxious . . . odors.” 35 P.S. § 4003. Simply put, the regulation of air pollution is both outside the regulatory authority and expertise of the Commission.

In the instant matter, as discussed *supra*, the regulation of tangible personal property of the railroad is both within the regulatory authority and the expertise of the Commission. Reading does not allege that another administrative body has regulatory authority over railroad facilities, here the safety of guide rails separating a sidewalk from the railroad property. Additionally, it is well established precedent that the Commission has been entrusted with the authority to regulate the safety of public utilities. *Consol. Rail Corp. v. Pa. Pub. Util. Comm’n*, 625 A.2d 741, 744 (Pa Commw. Ct. 1993). Section 1501 is but one of the statutory grants of authority given to the Commission to regulate the safety of public utilities, including railroads.

Reading also relies upon *Barone v. Pa. Pub. Util. Comm’n*, 485 A.2d 519 (Pa Commw. Ct. 1984), to support its position; however, this reliance is misplaced. *Barone* addresses only half of the Commission’s authority under § 1501. In *Barone*, the Complainant initiated an action against the Pennsylvania Gas and Water Company alleging that the respondent “failed to provide adequate water *service* in violation of Section 1501.” *Id.* at 520 (emphasis added). The complaint did not allege that the public utility’s facilities were in a state of disrepair, but merely that the service provided was inadequate pursuant to the Public Utility Code. The Complaint in this matter clearly alleges safety concerns regarding the facilities of Reading and not Reading’s service.

d. The Department lacks any specific knowledge to address the concerns set forth in Paragraph Five of Your Honor's Briefing Order.

The Department is unable, and without any specific knowledge, to identify: (1) the location of the guide rail at issue; (2) Reading's maintenance responsibilities thereof; and (3) the applicable rights of way. As such, the Department defers to the other parties in this matter to provide the information requested or in the alternative suggests that the facts requested can be established either through an evidentiary hearing and/or an amended Complaint.

V. Conclusion

The Department respectfully requests that the Preliminary Objections filed by Reading Blue Mountain and Northern Railroad be dismissed because of its failure to comply the relevant provisions of Title 52 of the Pennsylvania Code. In the alternative, the Department respectfully suggests that if required, that either an Evidentiary Hearing be held in to establish the facts to necessary to adjudicate the Preliminary Objections or to order the Complainant to amend its Complaint, thus rendering the Preliminary Objections moot.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: April 5, 2013

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's Brief was served upon the parties listed below, in accordance with the requirements of §1.54, by First-Class mail, postage prepaid and by electronic mail as indicated, this 5th day of April, 2013:

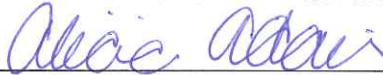
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