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May 10, 2013

VIA ELECTRONIC FILING


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

Re: Marlene Broman v. West Penn Power Company
Complaint Docket No. C-2013-2356237

Dear Secretary Chiavetta:

Enclosed for filing please find West Penn Power Company's Motion for Judgment on the Pleadings and Motion to Continue Hearing. The Motion for Judgment on the Pleadings requests dismissal of the Complaint of Marlene Broman for lack of subject matter jurisdiction.

Very truly yours,


John L. Munsch
Attorney

JLM:jss

Enclosures

cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BROMAN, MARLENE,	:	
Complainant,	:	
	:	
v.	:	Complaint Docket No. C-2013-2356237
WEST PENN POWER COMPANY,	:	
Respondent.	:	

NOTICE TO PLEAD


TO: MARLENE BROMAN:

You are hereby notified to file a written response to the attached Motion for Judgment on the Pleadings and Motion to Continue Hearing of West Penn Power Company within twenty (20) days from service hereof or a judgment may be entered against you. All pleadings, such as a Preliminary Objection, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for West Penn Power Company. Failure to respond to these Motions could result in the dismissal of your case.

Respectfully submitted,

Date: May 10, 2013

By:


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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BROMAN, MARLENE,	:	
Complainant,	:	
	:	
v.	:	Complaint Docket No. C-2013-2356237
WEST PENN POWER COMPANY,	:	
Respondent.	:	

**MOTION FOR JUDGMENT ON THE PLEADINGS ON BEHALF
OF WEST PENN POWER COMPANY TO DISMISS THE
FORMAL COMPLAINT OF MARLENE BROMAN
and
MOTION TO CONTINUE MAY 22, 2013, HEARING**

AND NOW, West Penn Power Company (“West Penn” or “Company”), through its counsel, files a Motion for Judgment on the Pleadings requesting dismissal of the Complaint of Marlene Broman for lack of subject matter jurisdiction and a Motion to Continue the May 22, 2013, Hearing.

I. INTRODUCTION

1. This Motion is filed pursuant to 52 Pa. Code §5.102 (relating to motion for judgment on the pleadings) and pursuant to 52 Pa. Code §5.103 (relating to general motions) and requests the dismissal of the Formal Complaint because the Complaint is based solely on issues regarding the validity and scope of a right of way document and therefore falls outside of the jurisdiction of the Pennsylvania Public Utility Commission (“PUC” or “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.

II. BACKGROUND

2. On April 8, 2013, West Penn received the Formal Complaint (“Complaint”) filed by the Complainant against West Penn.

3. The Complainant states that “I want the PUC to look at rules in the 1960’s and protect my property right.” She states: “I don’t think the intent of the ROW was to keep 180 feet of my property bare and available to West Penn....” The Complainant asserts that West Penn has conducted vegetation maintenance that is outside its lawful right of way.

4. West Penn filed an Answer to the Complaint on April 18, 2013. By Prehearing Order received by West Penn on April 25, 2013, the Presiding Officer scheduled a telephonic hearing for May 22, 2013, at 10 a.m.

5. The Complainant refers to and admits the existence of the transmission right of way agreement in her Complaint and attaches a single page of the right of way agreement to her Complaint. In its Answer, West Penn produced as Exhibit No. 1 a copy of a transmission right of way over the Complainant’s property which gives West Penn the authority to perform vegetation maintenance on that right of way. West Penn has produced, and is seeking to enforce, its right of way document entered into by and between Willford Broman, Sr., and Marlene Broman, dated April 9, 1968, which confirms the existence of the right of way through the Complainant’s property and which has been properly recorded at the Recorder of Deeds office.

6. The transmission right of way document states:

West Penn Power Company is also granted the right to cut, trim and remove all trees within the limits of said easement as well as any trees beyond said limits which may interfere or threaten to interfere with said transmission system.

III. THE VALIDITY AND SCOPE OF THE EASEMENT CHALLENGED BY COMPLAINANT IS A MATTER WITHIN THE JURISDICTION OF THE PENNSYLVANIA COURTS, NOT THE COMMISSION.

7. The Commission has only asserted jurisdiction in cases involving the *existence*, rather than the *scope and validity*, of an easement or right of way.

8. The Commission has only those duties, powers, responsibilities and jurisdiction as were expressly or by necessary implication given to it by the Legislature. Rogoff v. The Buncher Company, 395 Pa. 477, 151 A.2d 83 (1959); Western Pennsylvania Water Company, 10 Pa. Commw. 533, 311 A.2d 370 (1973). The Pennsylvania Supreme Court has held that the Commission does not have jurisdiction to determine the scope and validity of an easement. Fairview Water Company v. Pa. P.U.C., 509 Pa. 384, 393, 502, A.2d 162, 167 (1985).

9. The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. P.U.C., 157 Pa. Super. 595, 43 A.2d 348 (1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 427 Pa. 581, 235 A.2d 602 (1967).

10. In *Boczar v. PPL Electric Utilities Corporation*, Docket No. C-20016332 (Final 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, citing to *In re: Lou Amati/Amati Service Station v. West Penn Power Company and Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00945842 (Final Order entered October 25, 1996). In *Amati*, the Commission had ruled that questions involving trespass and whether or not utility facilities are

located pursuant to valid easements are exclusively within the jurisdiction of the Courts of Common Pleas.

11. In *Messina v. Bell Atlantic-Pennsylvania*, Docket No. C-00968225, Order entered September 23, 1998, the Commission carefully observed the limits of its jurisdiction, as recognized in *Amati*, and determined that it could only adjudicate cases involving the existence, rather than the scope and validity, of an easement.

12. A similar determination was made by the Commission in *Robert S.J. Nigro v. PPL Electric Utilities Corporation*, Docket No. C-00003242 (Final Order entered October 26, 2004), wherein the utility in question was unable to produce a written instrument purporting to grant a right of way across complainant's property.¹

13. In *Stavnicky v. PPL Electric Utilities Corporation*, Docket No. C-20043368 (Final Order entered July 13, 2005), the Commission again concluded that "subject matter jurisdiction in right of way disputes extends only to cases wherein there is no written documentation of an easement....The Commission is without subject matter jurisdiction to rule upon the validity or scope of that easement, as such jurisdiction is exclusively within the Courts of Common Pleas." In that case, the Commission dismissed Mr. Stavnicky's complaint for lack of subject matter jurisdiction because PPL presented written documentation of its easements, and the issues raised by Mr. Stavnicky related to the scope and validity of those easements.

14. The Commission reiterated its lack of jurisdiction over matters related to the scope and validity of an easement in the case of *Tomb v. Pennsylvania Electric Co.*, Docket No. C-2008-2036378 (Opinion and Order entered December 8, 2008) (This Commission is not the proper forum to resolve a controversy which will determine property rights, that is a matter for a

¹ The utility in *Nigro* had claimed an easement by prescription, and the Commission concluded that it was without jurisdiction to determine prescriptive easements.

court of general jurisdiction). See *Anne E. Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (July 11, 2003) (holding that, in a dispute regarding the location of right of way, the Commission had no jurisdiction to interpret the meaning of the written right of way). See also *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (September 15, 1999) (citing *Lou Amati/Amati Service Station v. West Penn Power Co. and Bell-Atlantic-Pennsylvania, Inc.*, Docket No. C-00945842 (October 25, 1995) where the Commission stated that real property issues such as trespass and whether or not utility facilities are located pursuant to valid easements or rights of way are within the exclusive jurisdiction of the Courts of Common Pleas of the Commonwealth); *Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, slip op. at 6-7 (May 28, 2008) (“Accordingly, the Complainant’s Exception on this issue is denied.”). The same result was reached in transmission right of way disputes where the Complaints were dismissed by pre-hearing motions. *Mauro v. Pennsylvania Electric Company*, Docket No C-2009-2114087 (Final Order entered July 16, 2010) and *Dengler v. Metropolitan Edison Company*, Docket No. C-2009-2112197 (Final Order entered September 25, 2009). Copies of the *Mauro* and of the *Dengler* opinions are attached hereto.

15. In the present case, the Complainant’s sole allegation against West Penn is that the trees being cut are outside the scope of West Penn’s right of way. The Complainant does not dispute that a right of way exists, and actually admits the existence of the right of way and attaches one page of the right of way in her Complaint.

16. As the cases referenced above clearly demonstrate, the Commission lacks the jurisdiction to adjudicate matters concerning the validity and scope of West Penn’s right of way because West Penn has provided written documentation of that right of way, and the Complainant admits in her Complaint that a valid right of way exists.

17. The decision regarding the scope and validity of a right of way document involves the application of contract and real property law, and as such is solely within the jurisdiction of the Pennsylvania Court of Common Pleas. The application of contract law and real property law to the recordation of deeds and plats, by their nature, fall squarely within the jurisdiction of the Pennsylvania Court of Common Pleas. 42 Pa. C.S. §931(a) outlines the original jurisdiction and venue of Pennsylvania's Common Pleas Courts and provides that:

Except where exclusive original jurisdiction of an action or proceeding is by statute or by general rule adopted pursuant to section 503 (relating to reassignment of matters) vested in another court of this Commonwealth, the courts of common pleas shall have unlimited original jurisdiction of all actions and proceedings, including all actions and proceedings heretofore cognizable by law or usage in the courts of common pleas.

Accordingly, this Commission should conclude that the determination regarding the scope and validity of a right of way as raised in this proceeding is outside the scope of its jurisdiction and a matter within the jurisdiction of the Pennsylvania courts.

18. Inasmuch as the law is clear that the Commission lacks subject matter jurisdiction in this proceeding, West Penn requests that the hearing scheduled for May 22, 2013, be cancelled or continued.

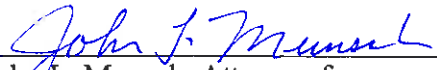
IV. CONCLUSION

WHEREFORE, West Penn Power Company respectfully requests that the Commission grant the Company's Motion for Judgment on the Pleadings and dismiss the Complaint of Marlene Broman with prejudice, on the grounds that the sole issue raised in the Complaint is outside the scope of Commission jurisdiction and within the jurisdiction of the Pennsylvania Courts,

AND WHEREFORE, West Penn Power Company requests that the telephonic hearing scheduled for May 22, 2013, in this matter be cancelled or continued.

Respectfully submitted,

Date: May 10, 2013

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

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BROMAN, MARLENE,	:	
Complainant,	:	
	:	
v.	:	Complaint Docket No. C-2013-2356237
WEST PENN POWER COMPANY,	:	
Respondent.	:	


CERTIFICATE OF SERVICE

I hereby certify that I have this day served by FEDEX overnight, and by FAX and/or email where possible, the foregoing **Motions** addressed as follows:

Katrina L. Dunderdale
Administrative Law Judge
Pennsylvania Public Utility Commission
Office of Administrative Law Judge
Piatt Place, Suite 2220
301 Fifth Avenue
Pittsburgh, PA 15222

Marlene Broman
4136 Patterson Road
Butler, PA 16002
bromarl@aol.com

Date: May 10, 2013



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Greensburg, PA 15601
(724) 838-6210

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held July 15, 2010

Commissioners Present:

James H. Cawley, Chairman, Dissenting
Tyrone J. Christy, Vice Chairman
John F. Coleman, Jr.
Wayne E. Gardner
Robert F. Powelson

Guy and Virginia Mauro

v.

C-2009-2114087

Pennsylvania Electric Company

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for decision are the Initial Decision (I.D.) of Chief Administrative Law Judge (CALJ) Veronica A. Smith issued on October 16, 2009, the Exceptions of Guy and Virginia Mauro (Complainants) and the Reply Exceptions of the Pennsylvania Electric Company (Respondent or Company).

History of the Proceeding¹

On June 18, 2009, the Complainants filed a formal Complaint against the Respondent with the Commission. Attached to the Complaint form were: a three-page

¹ The History is taken largely from the CALJ's Initial Decision at 1-2.

document dated June 8, 2009, setting forth the facts of the Complaint and the relief requested; a letter dated April 13, 2009, addressed to Mr. Mauro and informing him of the tree trimming and removal that the Company planned to do in the right-of-way located on his property; the first and fifth pages of a seven-page print-out of a Wisconsin court case; a one-page copy of an article titled "One Nation Under Judges;" a nine-page typed document titled "Powerline Hearing Testimony" dated November 21, 1992, and bearing the name and address of a Robert G. Kearnes, Sr. in Hollidaysburg, PA; a ten-page handwritten document reiterating the allegations contained in the Complaint; and a two-page copy of a deed dated 1922.

In their Complaint, the Complainants alleged that the Company was cutting trees in and beyond the Company's right-of-way within the Complainants' property. The Complainants also alleged that the Respondent has been "terrorizing" their family since 2001. Complaint at 7. The Complainants averred that Mr. Mauro has been arrested four times as a result of his dealings with Company representatives during their visits to the Complainants' property to perform maintenance work in the Company's right-of-way. As relief, the Complainants requested that the Commission "conduct a formal hearing on the right of way agreement of '1924 and 1951' which is so broad in scope, arbitrary and limitless in definition" and "has no bearing to [the] Mauros and the time we live in" because it was signed 85 years ago by "illiterate Italians who could neither read or write" and "who knew nothing of corrupt corporations." Complaint Attachment.

On July 9, 2009, the Respondent filed an Answer and New Matter denying the material allegations of the Complaint and averring that the Company has a valid 165-foot transmission right-of-way on the Complainants' property, and that the Company performs vegetation management on the transmission line in question in accordance with its Transmission Line Vegetation Management Program, which is part of the Company's overall process to ensure safe, reliable and adequate service to its customers. New Matter ¶¶ 12, 14; Exhibit 1.

Also on July 9, 2009, the Company filed a Preliminary Objection seeking to dismiss the Complaint on the grounds that the sole issue raised is outside the scope of Commission jurisdiction and within the jurisdiction of the Pennsylvania Courts.

On July 22, 2009, the Complainants filed an Answer to the Respondent's Preliminary Objection which denied that their Complaint deals solely with the scope and validity of the right-of-way, denied that they threatened Respondent's employees, and questioned "the role of the Commission over any issues related to the abuse of property owners by [the Company]." Answer to Respondent's Preliminary Objections ¶¶10-16.

On October 16, 2009, the CALJ's Initial Decision was issued. The CALJ granted the Company's Preliminary Objection, finding that the issues raised by the Complaint were beyond the Commission's jurisdiction and dismissed the Complaint with prejudice. I.D. at 4-5. On October 30, 2009, the Complainants filed their Exceptions to the Initial Decision. On November 9, 2009, the Company filed its Reply Exceptions.

Discussion

We note that any issue or Exception, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001), also *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Before considering the Exceptions, we note that the CALJ used the correct approach when making her determination on the Company's Preliminary Objection. The

CALJ observed that preliminary objections are expressly provided for in our Regulations at 52 Pa. Code § 5.101. She also stated the standard to be applied as follows:

A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental 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 has adopted this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. County of Allegheny v. Commw. of Pa., 490 A.2d 402 (Pa. 1985). Therefore, in ruling on a preliminary objection, the Commission must assume, for decisional purposes only, that the factual allegations of the Complaint are true. Id. The preliminary objection may be granted only if the moving party prevails as a matter of law. Roc v. Flaherty, 527 A.2d 211 (Pa. Cmwlth. 1985). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. Dept. of Auditor General, et al. v. State Employees' Retirement System, et al., 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) citing, Boyd v. Ward, 802 A.2d 705 (Pa. Cmwlth. 2002).

I.D. at 3-4.

The CALJ then determined that the primary issue raised by the Complainants required the interpretation of a right-of-way and whether or not an existing right-of-way was valid. I.D. at 4. Given that primary issue, the CALJ found that the Commission had no jurisdiction over property rights controversies, including controversies involving written right-of-way issues requiring a determination of the scope or validity of any particular, documented right-of-way. *Id.* at 6-7.

The CALJ also addressed an allegation in the Complaint in which the Complainants alleged that the Respondent had terrorized them. The CALJ found that Mr. Mauro, one of the Complainants, had been permanently enjoined by the Court of Common Pleas of Blair County from interfering with the work of the Respondent's crews within the right-of-way through the Complainants' property. I.D. at 8. Based upon that background, the CALJ determined that the allegations in the Complaint relating to the Company's interaction with the Complainants were more in the nature of a private dispute between citizens and the utility and not a subject under the jurisdiction of the Public Utility Commission. Accordingly, the CALJ found that the allegations relating to the Company's interactions with the Complainants failed to allege that the Company committed any act in violation of the Public Utility Code (Code) or the Commission's Regulations or Orders. *Id.*

The Complainants' Exceptions initially claim a "continual denial of due process as guaranteed by the Constitution of the United States. (Fifth Amendment of the Bill of Rights)." Exc. at 1. The Complainants next claim that bias has been shown in favor of the Company. *Id.* at 1-2. The Complainants' last two Exceptions express a general dissatisfaction with this Commission and the manner in which the Complaint was processed. The Complainants conclude with the following: "There is a saying that fits this situation; EVIL prevails when good men do nothing. Are there any good men, or women, working for the PUC?" Exc. at 2.

The Complainants' Exceptions fail to address the specific findings of the CALJ. They do not dispute that this proceeding was determined upon the Company's Preliminary Objection. They do not point to any error by the CALJ regarding the standard to be used in adjudicating this matter nor the CALJ's specific determinations regarding the lack of jurisdiction to entertain the subject matter of their Complaint.

We have carefully reviewed the CALJ's determinations in this matter and find that they are correct in all respects. As we observed above, the primary issue before us requests an interpretation into the scope and validity of a documented right-of-way. The CALJ correctly found that these types of disputes have historically been found to be outside of the Commission's jurisdiction. I.D. at 5-7, *citing, Anne E. Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (Order entered July 3, 2003) and *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Order entered September 15, 1999). Nothing in the Complainants' Exceptions leads us to conclude that the CALJ erred in any way in her discussion and determination relating to the right-of-way issue.

The Complainants have also failed to challenge the CALJ's determination relating to the allegations surrounding the Company's treatment of Mr. Mauro. Based upon the pleadings in front of us, including the Respondent's New Matter which went unanswered, the interactions between the Company and the Complainants have already been addressed by the Court of Common Pleas of Blair County. That result produced a permanent injunction which prohibits Mr. Mauro from interfering with the Company's work in the right-of-way. The CALJ correctly found that this type of issue is not one subject to the Code or our Regulations, but is more in the nature of a private dispute between a citizen and a utility. *See, Allport Water Authority v. Weindurne Water Company*, 393 A.2d 673 (Pa. Super. 1978). It is simply beyond our jurisdiction.

The case now before us involves the basic issue of whether or not this Commission possesses jurisdiction to hear the matter. We agree with the CALJ that we do not have jurisdiction and will dismiss the Complaint. In doing so, we are ruling on the Company's Preliminary Objection without a hearing. In *Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Order entered July 14, 1993), this Commission held that, in the normal course, we would not dismiss a *pro se* complaint without first providing a hearing during which the *pro se* complainant could further explain their position and the factual basis for their complaint. The concern was

expressed that, in general, *pro se* complainants may find it difficult to navigate through pre-hearing motions and should be given the chance to orally describe their basic issue and supporting facts.

A thorough reading of *Carlock* reveals that case was fact intensive. The utility moved for summary judgment on the basis that under the facts alleged, the utility could not be found to have violated the Code. However, unlike *Carlock*, the case now before us does not rest on the ability of a *pro se* complainant to describe the factual underpinnings of their complaint. This case is about subject matter jurisdiction. The relief requested is for a review of, and a ruling on, the validity of an existing, documented right-of-way. The secondary issue regarding Mr. Mauro's dealings with the Company has already been litigated and decided by the Blair County Court of Common Pleas. We have explained our agreement with the CALJ's rulings on these issues above. Against this backdrop, we find that a hearing would not enable the Complainants to better explain their positions or provide additional facts which would alter the inevitable conclusion that this Commission lacks jurisdiction to entertain the Complaint in the first instance. On that basis, we distinguish *Carlock* from the case now before us.

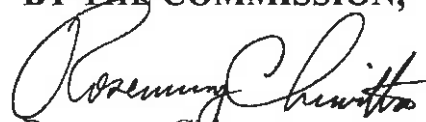
Conclusion

For the foregoing reasons, we will deny the Complainants' Exceptions and adopt the Initial Decision as our action in this matter; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions filed in this proceeding are denied.
2. That the Initial Decision of Chief Administrative Law Judge Veronica A. Smith, issued at this Docket on October 16, 2009, is adopted.
3. That the Complaint filed at this Docket on June 18, 2009, by Guy and Virginia Mauro is dismissed with prejudice.
4. That this proceeding be marked closed.

BY THE COMMISSION,


Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: July 15, 2010

ORDER ENTERED: **July 16, 2010**

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Henry and Julie Dengler :
 :
 v. : C-2009-2112197
 :
 Metropolitan Edison Company :

FINAL ORDER

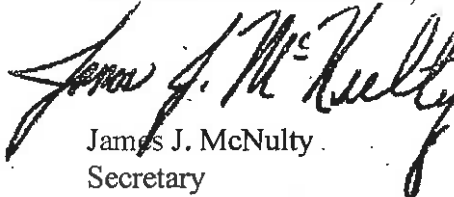
In accordance with the provisions of Section 332(h) of the Public Utility Code, 66 Pa. C.S. §332(h), the decision of Administrative Law Judge David A. Salapa dated September 25, 2009, has become final without further Commission action;

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by Metropolitan Edison Company at Docket No. C-2009-2112197 is sustained.
2. That the complaint of Henry and Julie Dengler at Docket No. C-2009-2112197 against Metropolitan Edison Company is dismissed with prejudice for lack of jurisdiction.
3. That the record at Docket No. C-2009-2112197 is marked closed.

BY THE COMMISSION,


James J. McNulty
Secretary

(SEAL)

ORDER ENTERED: November 17, 2009

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Henry and Julie Dengler	:	
	:	
v.	:	C-2009-2112197
	:	
Metropolitan Edison Company	:	

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

Before
David A. Salapa
Administrative Law Judge

HISTORY OF THE PROCEEDING

On June 1, 2009, Henry and Julie Dengler (Complainants) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against Metropolitan Edison Company (Respondent). At paragraph 4B of the complaint form requesting the facts of the complaint, the complaint simply states "See Attached". Attached to the complaint form are a one page document dated May 28, 2009 setting forth the facts of the complaint and the relief requested, several deeds, nine pages of photographs, a photocopy of a business card of one of the Respondent's employees and a photocopy of a notice from the Respondent regarding tree trimming and removal.

The document dated May 28, 2009 states that when the Complainants began planting trees on their property, the Respondent informed them that its right of way was ten feet wide from the centerline of its transmission lines. The document references an attached deed. The document further alleges that the Complainants planted trees more than eighteen years ago and have maintained the trees since that time. The document references attached photographs

of the trees. According to the document, the Complainants were never informed that the trees impeded the transmission lines or that the trees were even within the right of way.

The document alleges that the Complainants are opposed to the Respondent's decision to remove the trees. The document contends that the Complainants have requested that the Respondent prune the trees instead. According to the document, the Respondent has rejected the Complainants request to prune the trees. The Complainants have offered to prune the trees at their own expense but the Respondent has rejected that offer.

At paragraph 5 of the complaint form requesting how the Complainants want the complaint resolved, the complaint states "See Attached". The document dated May 28, 2009 states that the Complainants are not opposed to reasonable pruning by the Respondent. The Complainants offer to prune the trees to a predetermined height of at least twenty-five feet and maintain them at that height. The document offers that if the Complainants fail to maintain the trees at the agreed upon height, the Respondent may remove the trees. The document does not request any specific relief.

The Respondent filed an answer with new matter and a preliminary objection on June 29, 2009. The Respondent filed an amended answer with new matter and an amended preliminary objection on June 30, 2009. The amended answer admits that it informed the Complainants that it intends to perform vegetation maintenance consisting of tree removal on its existing one hundred twenty foot wide transmission right of way. The amended answer denies the tree removal falls outside its right of way.

The new matter asserts that it has a one hundred twenty foot wide transmission right of way over the Complainants' property that gives the Respondent the authority to perform vegetation maintenance on that right of way. According to the new matter, the Respondent is seeking to enforce the easement across the Complainants' property and refers to a copy of the easement document attached to the answer with new matter. The new matter contends that the Respondent has determined that the trees growing within its easement across the Complainants' property need to be removed to prevent them from interfering with and endangering its

transmission facilities. The new matter alleges that because of the hazards associated with vegetation management around electric facilities, the tree removal must be performed by skilled vegetation management personnel. The amended answer with new matter requests that the Commission dismiss the complaint with prejudice.

The amended preliminary objection alleges that the complaint raises issues regarding the scope and validity of the right of way documents attached to the complaint and the answer with new matter. According to the amended preliminary objection, the Commission has no jurisdiction to determine the scope and validity of the right of way. The preliminary objection contends that such a determination is solely within the jurisdiction of the courts of the Commonwealth.

The amended preliminary objection points out that the Complainants attached to their complaint a copy of a document showing a ten foot wide easement. The amended preliminary objection asserts that the Respondent attached to its answer and new matter a separate easement document that grants the Respondent a one hundred twenty foot wide easement for its transmission lines. According to the amended preliminary objection, the Complainants are arguing that the ten foot wide easement supersedes the one hundred twenty foot wide easement while the Respondent claims they are two separate, valid easements. The Complainants do not dispute the existence of an easement, only that the trees the Respondent wishes to remove are outside the scope of the Respondent's easement. The amended preliminary objection requests that the Commission dismiss the complaint with prejudice.

On July 9, 2009, the Complainants filed an answer to the Respondent's amended preliminary objection stating that the Commission has jurisdiction over the transmission lines that are the subject of the easement and the dispute between the parties. The answer to the amended preliminary objection disputes that an easement exists on the Complainants' property. Alternatively, the Complainants contend that the Respondent should be estopped from removing the trees on their property since the Complainants contacted the Respondent when they planted the trees and the Respondent did not object to them planting the trees. According to the answer

to the amended preliminary objection, the Respondent has inspected the Complainants' property numerous times in the past and never objected to the location of the trees.

By hearing notice dated September 5, 2009, the Commission scheduled a hearing for this matter on September 30, 2009 at 10:00 a.m. in Hearing Room 3, Commonwealth Keystone Building, Harrisburg and assigned the case to Administrative Law Judge (ALJ) Susan D. Colwell. By hearing notice dated September 8, 2009, the Commission cancelled the hearing scheduled for September 30, 2009.

By notice dated September 16, 2009, the Commission notified the parties that it had assigned the case to me as motion judge. The preliminary objection is ready for decision. For the reasons set forth below, I will sustain the preliminary objection and dismiss the complaint.

FINDINGS OF FACT

1. The Complainants in this case are Henry and Julie Dengler.
2. The Respondent in this case is Metropolitan Edison Company.
3. On June 1, 2009, the Complainants filed a complaint with the Commission against the Respondent.
4. The Respondent filed an amended answer with new matter on June 30, 2009.
5. On June 30, 2009, the Respondent filed an amended preliminary objection.
6. On July 9, 2009, the Complainants filed an answer to the preliminary objection.

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 objection asserts lack of Commission jurisdiction pursuant to 52 Pa. Code §§5.101(a)(1). 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. Cmwlt. 1988) The Commission must view the complaint in this case in the light most favorable to the Complainants and should dismiss the complaint only if it appears that the Complainants 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. Cmwlt. 1989); Lehigh Valley Power Committee v. Pennsylvania Pub. Util. Comm'n., 563 A.2d 548 (Pa. Cmwlt. 1989); S.M.E. Bessemer Cement, Inc. v. Pennsylvania Pub. Util. Comm'n., 540 A.2d 1006 (Pa. Cmwlt. 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 Complainants, the complaint alleges that when the Complainants began planting trees on their property, the Respondent informed them that its right of way was ten feet wide from the centerline of its transmission lines. The Complainants planted trees more than eighteen years ago and have maintained the trees since that time. The Complainants were never informed that

the trees impeded the transmission lines or that the trees were even within the right of way. The Complainants are opposed to the Respondent's decision to remove the trees. The Complainants have requested that the Respondent prune the trees instead. The complaint alleges that the Respondent has rejected the Complainants request to prune the trees. The Complainants have offered to prune the trees at their own expense but the Respondent has rejected that offer.

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 regarding the scope and validity of its right of way. The Respondent contends that the Commission has no jurisdiction to determine the scope and validity of the right of way. The preliminary objection contends that such a determination is solely within the jurisdiction of the courts of the Commonwealth. I agree.

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)

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.

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.

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.

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.

Accepting as true all the facts alleged in the complaint, the Complainants are not entitled to relief as a matter of law. There is no factual dispute that an easement exists as both parties have attached copies of documents to their pleadings showing different easements. Since there is no factual dispute with regard to this issue, there is no need for a hearing on the issue. The dispute in this case is whether either easement is valid and if so whether that

easement authorizes the Respondent to remove the trees that are the subject of this dispute. As set forth above, the Commission has only asserted jurisdiction in cases involving the existence of an easement rather than the scope and validity. Since the Commission's jurisdiction does not extend to determining the scope or validity of an easement, I will sustain the preliminary objection.

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-2009-2112197 is dismissed with prejudice.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objection filed by Metropolitan Edison Company at Docket No. C-2009-2112197 is sustained.

2. That the complaint of Henry and Julie Dengler at Docket No. C-2009-2112197 against Metropolitan Edison Company is dismissed with prejudice for lack of jurisdiction.

3. That the record at Docket No. C-2009-2112197 is marked closed.

Date: September 25, 2009

David A. Salapa
Administrative Law Judge