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March 25, 2014

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

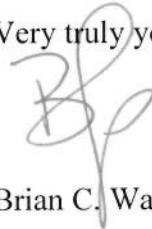
Re: Edward M. Wyland v. West Penn Power Company
Docket No. C-2014-2408499

Dear Secretary Chiavetta:

On behalf of West Penn Power Company, I have enclosed for electronic filing the Preliminary Objections of West Penn Power Company to the Formal Complaint of Edward M. Wyland in the above-captioned matter.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Brian C. Wauhop

BCW/tlg
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

EDWARD M. WYLAND

v.

WEST PENN POWER COMPANY

:
:
:
:
:

Docket No. C-2014-2408499

NOTICE TO PLEAD

TO: Edward Morascyzk, Esquire
Morascyzk, Stopperich & Associates
382 West Chestnut Street
Washington, PA 15301

Pursuant to 52 Pa. Code § 5.101(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of West Penn Power Company to the Formal Complaint of Edward M. Wyland within **ten (10) days** from service of this Notice, the facts set forth by West Penn Power Company in the Preliminary Objections may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for West Penn Power Company, and where applicable, the Administrative Law Judge presiding over the case.

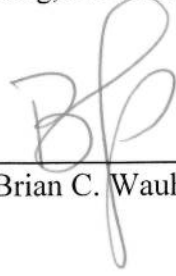
File with:

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

With a copy to:

Brian C. Wauhop
Buchanan Ingersoll & Rooney, PC
409 North Second Street
Suite 500
Harrisburg, PA 17101

Dated: March 25, 2014



Brian C. Wauhop, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

EDWARD M. WYLAND	:	
	:	
v.	:	Docket No. C-2014-2408499
	:	
WEST PENN POWER COMPANY	:	

**PRELIMINARY OBJECTIONS TO THE COMPLAINT OF
EDWARD M. WYLAND**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

West Penn Power Company (“West Penn” or the “Company”) by and through its counsel Brian C. Wauhop, Alan Michael Seltzer, and Buchanan Ingersoll & Rooney PC, files these Preliminary Objections pursuant to Section 5.101(a) of Pennsylvania Public Utility Commission (“Commission”) regulations at 52 Pa. Code §§ 5.101(a)(1) and (2), and in support thereof, avers as follows:

I. Introduction

1. In his recently filed Formal Complaint, Edward M. Wyland (“Complainant”) alleges that West Penn intends to remove certain trees that are incompatible with West Penn’s transmission facilities located on his property at 68 Ramsey Road, Washington, Pennsylvania 15301 (“Service Location”). (Compl. ¶ 4(A).) The portion of the Service Location at issue in this dispute is located within a lawful right-of-way obtained by the Company in 1922 via eminent domain proceedings. The Complainant requests that the Commission order West Penn to allow the Complainant to maintain the vegetation in the right-of-way in lieu of the Company doing so and pay damages to the Complainant. (*Id.* ¶ 5.)

2. As explained in greater detail below, the Commission does not have jurisdiction to adjudicate the Formal Complaint because the Company’s authority to access the relevant

portion of the Service Location and to conduct vegetation management thereon is controlled by a lawful right-of-way obtained by the Company. As a result, neither the interpretation nor enforcement of that right-of-way is subject to the Commission's jurisdiction in this proceeding.

3. Finally, to the extent the Formal Complaint requests that the Commission order the Company to pay the Complainant damages, the Commission does not have the power or legal authority to grant such relief.

4. As a result, the Company requests that these Preliminary Objections be granted and that the Commission dismiss the Formal Complaint with prejudice.

II. Background

5. West Penn is an electric distribution company that is certificated as a public utility in Pennsylvania.

6. In 1922, the Company obtained a lawful right-of-way across the Service Location via eminent domain.¹ In the Formal Complaint, the Complainant acknowledges the existence of the Company's right-of-way across his property. (Compl. ¶ 4).

7. The Company's Windsor to Washington TMU-427B 138-kilovolt ("kV") transmission line and related facilities cross the Service Location via the right-of-way.

8. On or about February 24, 2014, the Complainant filed a Formal Complaint with the Commission against West Penn at the above-captioned docket requesting that the Commission order the following relief:

¹ By way of background, the Company's New Matter filed in this action on March 25, 2014 explains that the Company completed all of the steps necessary to obtain a right-of-way via eminent domain including (i) obtaining a Certificate of Public Convenience from the Public Service Commission; (ii) providing notice to all affected landowners; (iii) filing a petition and bond with the Washington County Court of Common Pleas; (iv) and paying all required court costs. After the Company completed all of the steps necessary to appropriate the right-of-way, the Washington County Court of Common Pleas closed the Miscellaneous and Ejectments docket for the eminent domain action on November 5, 1923. *See* Answer and New Matter of West Penn Power Company, ¶¶ 11-19 and Exhibits A through F attached thereto.

I would like to see this resolved by the utility leaving me the opportunity to continue to self-maintain my property.

*

*

*

I do not believe that the utility has the right to clear cut in a maintained residential area. If proven that they do indeed have the right to clear cut the trees on my property, I do not want them to simply cut the trees at ground level and leave me with 6 or 7 stumps to deal with. I want the trees to be completely removed including the root balls and back filled with topsoil and seeded with grass to match the rest of the yard. I also want to be compensated for each tree and or shrub that is to be removed.

(Compl. ¶ 5.)

9. On or about March 5, 2014, the Formal Complaint was served on West Penn.

10. West Penn is timely filing its Answer and New Matter contemporaneously with these Preliminary Objections.

III. Argument

11. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101; see also *Equitable Small Transportation Interveners v. Equitable Gas Company*, Docket No. C-00935435 (July 18, 1994).

12. 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.

(7) Standing of a party to participate in the proceeding.

13. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners*, Docket No. C-00935435 (July 18, 1994).

14. Administrative motions practice before the Commission contemplates the filing of a preliminary objection to the legal insufficiency of a complaint. *See* 52 Pa. Code § 5.101(a)(4).

15. 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).

16. Thus, in resolving a preliminary objection, the Commission must assume that:

[a]ll material facts set forth in the complaint as well as all inferences reasonably deductible therefrom are admitted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.

McMahon v. Shea, 688 A.2d 1179, 1181 (Pa. 1997).

17. The Commission may dismiss a complaint without hearing if, in its opinion, a hearing is not necessary in the public interest. 52 Pa. Code § 5.21(d); *see also Lydine Dutton v. Cordia Communications Corporation*, Docket No. F-2010-2201413 (Initial Decision entered March 10, 2011; Order entered September 22, 2011) (citing 66 Pa.C.S. § 703(b)).

A. Preliminary Objection Regarding Jurisdiction Pursuant to 52 Pa. Code § 5.101(a)(1).

18. Paragraphs 1-17 of these Preliminary Objections are incorporated by reference as if fully set forth herein.

19. In the Formal Complaint, the Complainant requests that the Commission interpret the scope of an easement and order specific relief:

I do not believe that the utility has the right to clear cut in a maintained residential area. If proven that they do indeed have the right to clear cut the trees on my property, I do not want them to simply cut the trees at ground level and leave me with 6 or 7 stumps to deal with. I want the trees to be completely removed including the root balls and back filled with topsoil and seeded with grass to match the rest of the yard. I also want to be compensated for each tree and or shrub that is to be removed.

(Compl. ¶ 5.)

20. The right-of-way acquired by the Company via eminent domain addresses the Company's rights and obligations with respect to vegetation maintenance within the right-of-way at the Service Location. It is clear that the Complainant's request for relief seeks the Commission's interpretation, modification or enforcement of a lawful right-of-way in favor of the Company.²

21. The Commission's procedural regulations allow a party to object to claims that are beyond the jurisdiction of the Commission to hear and resolve. *See* 52 Pa. Code § 5.101(a)(1).

22. It is well-settled that the Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. Pennsylvania Pub. Util. Comm'n.*, 43 A.2d 348 (Pa. 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

² *See supra*, Note 1.

decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

23. It is equally well-settled that the Commission does not have the jurisdiction and is not otherwise empowered to decide *private* contractual disputes between a citizen and a utility. *Robert Wells v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2012-2287577 (Initial Decision entered April 23, 2012) (emphasis in original) (citing *Byer v. Peoples Natural Gas Co.*, 380 A.2d 383 (Pa. Super. 1977); *Leveto v. National Fuel Gas Distribution Corp.*, 366 A.2d 270 (Pa. Super. 1976); *Reading & Southwestern Street Railway Co. v. Pa. Pub. Util. Comm'n.*, 77 A.2d 102 (Pa. Super. 1950)).

24. The Pennsylvania Supreme Court has emphatically determined that the Commission does not have jurisdiction to determine the scope and validity of an easement. *Fairview Water Company v. Pa. P.U.C.*, 502 A.2d 162 (Pa.1985). The Commission recognizes that issues surrounding the interpretation and enforcement of an easement are not within its jurisdiction to decide:

In *Boczar v. PPL Electric Utilities Corp.*, Docket No. C-20016332 (Opinion and 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. The Commission concluded, therefore, that it was without jurisdiction to determine property rights concerning those easements. In *In re: Lou Amati/Amati Service Station v. West Penn Power Company and Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00945842 (Order entered October 25, 1996), the Commission rule[d] 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.

Jennifer Tomb v. Pennsylvania Electric Company, Docket No. C-2008-2036378 (Final Order entered December 8, 2008). In *Jennifer Tomb*, the Commission concluded that “the Commission

is not the proper forum to resolve property right controversies. Rather, that is a matter for a court of general jurisdiction.” *Id.*

25. Likewise, the Commission is not empowered to determine the existence of an easement by implication or prescription. *Messina v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00968225 (Final Order entered September 23, 1998 concluding, inter alia, that “this Commission should not engage in a determination of the property rights of Bell [the public utility] and the Complainant. A conclusion that Bell has perfected an easement by prescription is the type of matter over which the courts are better suited to decide. . . [the Commission does] not have jurisdiction to conclude that Bell should be entitled to maintain its lines across the property of Mr. Messina as a result of an easement by prescription.”)

26. The Commission routinely dismisses formal complaints requesting interpretation of a lawful right-of-way upon a utility’s preliminary objection to the subject matter jurisdiction of the Commission to adjudicate these types of claims. *See Mohn v. PPL Electric Utilities Corp.*, Docket No. C-2012-2301470 (Opinion and Order entered October 11, 2012 affirming Initial Decision that sustained preliminary objections and dismissed portion of formal complaint regarding vegetation maintenance that raised claims arising from an easement); *Mauro v. Pennsylvania Electric Company*, Docket No. C-2009-2114087 (Final Order entered July 16, 2010 affirming Initial Decision that sustained preliminary objections and dismissed entire formal complaint with prejudice because the “primary issue [in the formal complaint] requests an interpretation into the scope and validity of a documented right-of-way. The Chief Administrative Law Judge correctly found that these types of disputes have historically been found to be outside of the Commission’s jurisdiction.”); *Dengler v. Metropolitan Edison Company*, Docket No. C-2009-2112197 (Final Order entered November 17, 2009 affirming Initial Decision that sustained preliminary objections and dismissed entire formal complaint with

prejudice because “[t]he dispute in this case is whether [either of two] easement[s] 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.”)

27. Applied here, the primary issue advanced in the Formal Complaint requests an interpretation of the scope and validity of Company’s property rights as set forth in a right-of-way. The Formal Complaint acknowledges the existence of the right-of-way, but questions the rights granted to the Company therein. (Compl. ¶ 5, “I do not believe that the utility has the right to clear cut in a maintained residential area.”) The Formal Complaint requests that even if it is “proven” (apparently before the Commission) that the Company has the right to cut vegetation growing in the right-of-way on the Complainant’s property, the Commission should place conditions and restrictions upon the Company’s conduct within the lawful right-of-way. (*Id.*, “I do not want them to simply cut the trees at ground level . . . I want the trees to be completely removed including the root balls and back filled. . . I want to be compensated. . .”). The Complainant is clearly asking the Commission to interpret the terms of the right-of-way and order the Company to undertake tasks that would otherwise be governed by the right-of-way itself, i.e., functions that are beyond the Commission’s power, authority and jurisdiction. The Commission does not have the jurisdiction to interpret easements and make determinations regarding property rights. *Jennifer Tomb, Messina, supra.*

28. Accordingly, and assuming all of the well-pleaded facts contained in the Formal Complaint are true, the Complainant has not stated a claim within the Commission’s jurisdiction to adjudicate because, as a matter of law, the acts complained of relate to the interpretation and

enforcement of a right-of-way. (Compl. ¶¶ 4, 5.) The Commission cannot interpret and enforce the terms of a right-of-way. *See* 66 Pa.C.S. § 701; *City of Pittsburgh*; *Robert Wells v. Columbia Gas of Pennsylvania, Inc.*; *Fairview Water Company*; *Jennifer Tomb*, *supra*. Therefore, the Commission should sustain the Company’s Preliminary Objections and dismiss the Formal Complaint with prejudice because it raises claims that are beyond the Commission’s jurisdiction to decide. *See Mohn, Mauro, Dengler, supra*.

B. Preliminary Objection Regarding Impertinent Matter Pursuant to 52 Pa. Code § 5.101(a)(2).

29. Paragraphs 1 through 28 of these Preliminary Objections are incorporated by reference as if fully set forth herein.

30. In Paragraph 5 of the Formal Complaint, the Complainant demands the following: “I want to be compensated for each tree and or shrub that is to be removed.” (Compl. ¶ 5.) Clearly, the Formal Complaint is seeking monetary damages from the Company.

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

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

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

Feingold, 383 A.2d at 794.

33. A prayer for damages which are not legally recoverable in the cause of action is “impertinent matter” in the sense that it is irrelevant to that cause of action, and is correctly

challenged through a motion to strike the requested relief as impertinent matter. *Third Avenue Realty Limited Partners v. Pennsylvania-American Water Co.*, Docket No. C-2010-2167286 (Final Order entered September 30, 2010) (citing *Hudock v. Donegal Mut. Ins. Co.*, 264 A.2d 668 (Pa. 1970)).

34. Therefore, in accordance with Pennsylvania law, this Commission does not have the power to award monetary damages, and the Complainant's request for money damages is an impertinent matter that must be stricken.

IV. Conclusion

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that the Commission grant its Preliminary Objections and (i) dismiss the Formal Complaint in its entirety because the Commission is without jurisdiction to interpret and enforce a private written easement agreement between a customer and a utility, and (ii) strike the Complainant's request for money damages; (iii) expressly prohibit the Complainant from introducing any testimony or exhibits at the evidentiary hearing regarding any alleged damages; and (iv) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,



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Harrisburg, PA 17101-1357
(717) 237-4975

Attorneys for
West Penn Power Company

Dated: March 25, 2014

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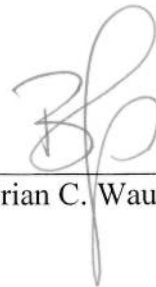
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

First Class Mail

Edward Morascyzk, Esquire
Morascyzk, Stopperich & Associates
382 West Chestnut Street
Washington, PA 15301

Dated this 25th day of March, 2014.



Brian C. Wauhop, Esq.