



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

July 3, 2014

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

RE: **Docket No. C-2014-2426416**

Dear Secretary Chiavetta:

Enclosed for filing please find the Department's *Brief in Support of its 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: Parties of Record
Mark J. Chappell, P.E., Chief, Utilities and Right-of-Way Section
Joseph Strok, District Grade Crossing Administrator, District 4-0
Thomas A. Walter, Assistant District Traffic and Operations Manager, District 5-0

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

READING BLUE MOUNTAIN	:	
AND NORTHERN RAILROAD	:	Complaint Docket
COMPANY	:	No: C-2014-2426416
	:	
Complainant	:	
	:	
v.	:	
	:	Electronically Filed
COMMONWEALTH OF	:	
PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Respondent	:	

**COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF
TRANSPORTATION’S BRIEF IN SUPPORT OF ITS 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, and Nicholas D. Mertens, Assistant Counsel, and files the foregoing Brief in Support of its Preliminary Objections to the Formal Complaint of the Reading Blue Mountain and Northern Railroad Company (“Reading”):

I. Statement of the Case

On or about June 13, 2014, Reading filed a Formal Complaint Form with the Pennsylvania Public Utility Commission (“Commission”) against the Department.¹ The Complaint was also served on June 13, 2014. Reading’s complaint is in the form of a public utility complaint form. *See generally* Complaint. It alleges that the Department is a public utility;

¹ On or about April 11, 2013, Reading filed a substantially similar complaint. The complaint was docketed at C-2013-2357454. The Department responded by filing an Answer and New Matter, Preliminary Objections, and Briefs supporting same. On June 12, 2013, Reading’s counsel filed a Petition seeking to withdraw the complaint based on the fact that Reading believed the Department’s Preliminary Objections “may have merit.” On July 30, 2013, the Commission granted Reading’s Petition and closed the matter. Copies of these documents have been included as exhibits to the Department’s Answer and New Matter and its Preliminary Objections.

however, Reading failed to state the service allegedly provided. Complaint ¶ 3. Reading alleges that the Department's decision to permit vehicles to haul beneficial combustion ash, or fly ash, is causing damage to an at-grade highway-rail crossing where a single track owned by Reading crosses State Route 940 (Berwick Street) in the Borough of White Haven, Luzerne County. (DOT Number 361 403 J). Complaint ¶ 4. In Paragraph five (5) of Reading's complaint, it asks the Commission to order the Department to:

- 1) Discontinue permitting overweight vehicles to cross over any RBMN crossing
- 2) Order PaDot to reimburse RBMN for all costs associated with maintenance, replacement and repair of this crossing
- 3) Order PaDot to require a Bond in favor of PaDOT and RBMN to assure payment for the costs addressed above in the amount not less than \$100,000.00
- 4) Without an order from the PUC, PaDot will not reimburse RBMN for the cost of repairing the damage caused by the overweight trucks nor will it restrict the excessive weights causing the destruction to the crossing

Complaint ¶ 5. As such, Reading is requesting that the Commission: prohibit vehicles, traveling under present and future special hauling permits, from crossing over Reading owned and operated crossings; allocate future maintenance, repair, and replacement costs of Reading's crossing onto the Department; and to require the Department to bond the crossing.

This crossing is the subject of four prior Commission orders; the most recent Secretarial Letter directs all future costs and maintenance responsibilities for the crossing and up to twenty-four (24") inches from the outermost rails onto Reading. *Application of Aqua Pa, Inc.*, PUC Docket No. A-2011-2264535 (Secretarial Letter, Nov. 22, 2011).

II. Question Presented

Whether the Commission lacks jurisdiction, under Public Utility Code (“Code”), to issue an injunction relative to the Department’s issuance of special hauling permits?

Suggested Answer: Yes.

Whether the Commission lacks jurisdiction, under the Code, to allocate future maintenance, repair, and replacement costs of an at-grade rail-highway crossing upon the Department, when the complainant does not request that a crossing be constructed, relocated, suspended, altered, or abolished pursuant to 66 Pa.C.S. §2702?

Suggested Answer: Yes.

Whether the Formal Utility Complaint should be dismissed as legally insufficient for failure to set forth a violation of the Code, a Commission Regulation, or a Commission order?

Suggested Answer: Yes.

Whether the Complaint should be dismissed as legally insufficient under the Doctrine of Ripeness when the complainant seeks the allocation of future maintenance, replacement, and repair costs without alleging that a rail-highway crossing is in the need of reconstruction, relocation, suspension, or abolishment?

Suggested Answer: Yes.

III. Summary of the Argument

Administrative agencies of the Commonwealth act pursuant to authority vested by the General Assembly; as such, they may assume jurisdiction from either the “express words contained in the enabling statutes or by a strong and necessary implication from those words.” The Commission is subject to this rule. The Complaint filed by Reading fails to form a cognizable cause of action under the Code. Reading alleges that the Department is a public utility

and that the Department's permittees are causing damage to its crossings. However, Reading's claim is not pursuant to 66 Pa.C.S. §2702, as it is merely seeking future cost allocation and not the construction, relocation, suspension, or abolition of a crossing. Additionally, the Commission lacks jurisdiction under 66 Pa.C.S. §§ 701 or 1501, as case law clearly demonstrates that the Department is not a public utility.

Reading has failed to state a single way in which the Department has violated a provision of the Code, a Commission Regulation, or a prior Commission order. As such, Reading has "failed to set forth grounds upon which relief can be granted" and thus its complaint is legally insufficient. Reading also fails to demonstrate that the relief sought for future costs allocation is ripe. Its claim will mature when Reading alleges that the subject crossing is in need of alterations pursuant to 66 Pa.C.S. §2702; it has failed to do so in the present matter.

IV. Argument

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 a case by means of the preliminary objections 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). "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. Cmwlt.

1987). Because the Commission lacks jurisdiction, as a matter of law, over Reading's claims, Count I of the Preliminary Objections should be sustained and the Complaint dismissed.

In ruling upon preliminary objections in the nature of a demurrer, legal insufficiency, civil practice requires that a court determine whether the facts pled are legally sufficient to permit the action to continue. *Ruby v. Dep't of Trans.*, 632 A.2d 635, 636 (Pa. Cmwlth. 1993). A demurrer admits well plead facts as true, but does not admit conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Dep't of Public Welfare v. Portnoy*, 566 A.2d 336 (Pa. Cmwlth. 1989) *aff'd* 612 A.2d 1349 (Pa. 1992). Because it is clear from the Complaint that Reading is not entitled to relief based upon the alleged facts, Count II of the Department's Preliminary Objections should be sustained and the Complaint dismissed.

a. The Commission Lacks Subject Matter Jurisdiction.

As an administrative agency, the Commission's jurisdiction is vested by the General Assembly. The Supreme Court has stated: "[t]he power of the Commission is statutory, arising either from the express words contained in the enabling statutes or by a strong and necessary implication from those words and the legislative grant of power to act in any particular case must be clear." *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 791 A.2d 1155, 1159-60 (Pa. 2002) (internal citations omitted). The Commission's primary purpose is to "supervise and regulate all public utilities" within the Commonwealth. 66 Pa.C.S. §501(b). Section 501 grants the Commission broad power; however, the Commonwealth Court has stated that "this broad power must be read in light of the enumerated powers set forth in the Code and in conjunction with the purpose of the PUC to *regulate and control public utilities in determining cost and service to the public.*" *United Tel. Co. of Pa. v. Pa. Pub. Util. Comm'n*, 676 A.2d 1244, 1251 (Pa. Cmwlth.

1996) (emphasis added). As such, a complainant must be able to direct the Commission to a specific statutory provision within the Code, or a reasonable regulation derived from the Commission's power, which grants the Commission jurisdiction; Reading has failed to do so.

i. Reading failed to allege in its Complaint a present need to construct, relocate, alter, or abolish one of its grade crossings.

The Commission's jurisdiction over rail-highway crossings is limited to the construction, relocation, alteration, or abolition of grade crossings within the Commonwealth. 66 Pa.C.S. §§2702 and 2704. Additionally, the Commission has jurisdiction over the services and facilities of public utilities, including railroads. 66 Pa.C.S. §1501. The Commission also has limited jurisdiction over the Commonwealth. Pursuant to the Department's enabling legislation, it is given the statutory authority "[t]o appear or intervene as a party, when the secretary deems it appropriate, before the Public Utility Commission when transportation problems are being considered by the commission." 71 P.S. §512(a)(14). The Commission has the authority to allocate costs onto concerned parties, including the Department, for the "cost of construction, relocation, alteration, protection, or abolition" of a crossing. 66 Pa.C.S. §2704(a).² See 52 Pa. Code §3.361 (the Department, when applicable, must be made a respondent to a complaint arising under 66 Pa.C.S. §2702).

In the present case, Reading has not filed a complaint or an application seeking to construct, relocate, suspend, or abolish a rail-highway crossing pursuant to 66 Pa.C.S. §2702. Commission Regulations allow a complainant to allege "that a crossing is dangerous or inadequate;" however, the complainant must allege that the crossing "requires reconstruction,

² Additionally, the State Highway Law requires the Department to refer to the Commission when it cannot reach an agreement with a public utility in regards to the amount to be paid for relocation expenses made necessary by a Department project. 36 P.S. §§ 670-412 and 670-412.1. The present case does not involve the "construction, widening or relocation of any State highway, bridge or tunnel." *Id.*

relocation, alteration or abolition.” 52 Pa. Code §3.361. Reading has failed to do so and as such, the Commission lacks jurisdiction over the present matter.

While the Commission has exclusive jurisdiction over the construction, relocation, alteration, and abolition of rail-highway crossings—Reading’s complaint merely relates to one of its crossings—and the mere fact that a crossing is relevant to the cause of action does not bring it into the purview of the Commission. As the Supreme Court held in *PECO Energy*, “the legislative grant of power to act in any particular case must be clear” and the Code clearly establishes subject matter jurisdiction over rail-highway crossings only in limited circumstances. 791 A.2d at 1160. See *Virgilli v. Southwestern Water Auth.*, 427 A.2d 1251, 1253 (Pa. Cmwlth. 1981) (noting that the Commission does not have exclusive jurisdiction over all matters involving public utilities). Additionally, the Commission cannot allocate future maintenance or costs without a proper proceeding brought under Chapter 27 of the Code. Nor may the Commission award damages to any concerned party, unless said damages arise under 66 Pa.C.S. §2704(a).

ii. The Commission lacks jurisdiction over the special hauling permit program.

The Code does not grant the Commission the authority to rule upon the Department’s permitting process, regardless of the fact that its permittees cross rail-highway crossings. No provision in the Code or elsewhere grants the Commission the authority to issue injunctive relief relative to the Department’s issuance of special hauling permits. In fact, the Vehicle Code grants the Department, in regards to state highways, the exclusive authority to issue special permits for overweight vehicles.

In *Country Place Water Treatment Co. v. Pa. Public Utility Commission*, the Commonwealth Court held that the Commission lacks jurisdiction over offensive odors

emanating from a public utility's treatment plant. 654 A.2d 72 (Pa. Cmwlth. 1995). The Court based its decision, *inter alia*, on the fact that the General Assembly had vested authority with another Commonwealth agency to investigate complaints into the subject matter. The Court's decision in *Country Place* is relevant to the instant matter.

In the present matter, the Department has the sole authority, pursuant to 75 Pa.C.S. §4961 *et seq.*, to permit vehicles weighing over 80,000 pounds to travel on state routes. This authority also allows the Department to prescribe conditions and specific travel times and routes. Additionally, the Department must direct its permittees to avoid the interstate highway system. Neither the Commission nor the Department has the authority to direct these specific permittees onto the interstate highway system to avoid the subject crossing. *See* 75 Pa.C.S. §4979.2 (overweight vehicles permitted on state routes that carry waste coal, beneficial combustion ash, or limestone may not exceed 95,000 pounds and are not permitted to move upon interstate highways); 23 CFR §658.17(b) ("The maximum gross vehicle weight [on federal-aid highways] shall be 80,000 pounds except where lower gross vehicle weight is dictated by the bridge formula"). Requiring said permittees to avoid Reading owned and operated crossings, by use of the interstate system, would violate both state and federal law.

iii. The Department is not a "public utility."

Additionally, the Department is not a public utility subject to the jurisdiction of the Commission. The complaint alleges that the Department is a public utility, but fails to state what type of utility service is allegedly provided by the Department. Complaint ¶ 3. The allegation that the Department is a public utility defies the plain meaning of the Code, case law, and common logic. *See* 66 Pa.C.S. §102 (the Code defines "public utility"). The definition of public utility does not make any specific inclusion or exclusion of the Department; however, the

Department may only act and conduct its business as set forth in its enabling legislation, Act 1929-175, P.L. 177, *as amended by* Act 1970-120, P.L. 356, 71 P.S. §511 *et seq.*, or other acts of the General Assembly. No provision of the Pennsylvania Statutes or Consolidated Statutes grant the Department the authority to conduct itself as a public utility.

In *Commonwealth v. Merritt Chapman & Scott Corp.*, the Supreme Court specifically held that the Turnpike Commission, an Agency of the Commonwealth, is not a public utility under the Commission's jurisdiction, regardless of the fact it provides facilities for "use as a canal, turnpike, tunnel, bridge, wharf, and the like for the public for compensation." 248 A.2d 194, 195–96 (Pa. 1968) *quoting* 66 P.S. 1102(17).³ In *Merritt Chapman*, a taxpayer claimed that the Turnpike Commission was a public utility within the meaning of the Code to avoid tax liability for materials bought in connection with the building of a tunnel. *Id.* at 195. The taxpayer claimed that the Turnpike Commission was a public utility because it provided facilities for the "[u]se as a canal, turnpike, tunnel, bridge, wharf, and the like for the public for compensation." *Id.* However, the Court held that an instrumentality of the state, such as a state agency, cannot constitute a "person or corporation" within the meaning of the Code and as such is not a public utility. 248 A.2d at 195. The Department, as an agency of the Commonwealth, cannot be defined as a public utility. Therefore, the Department's highways are not utility facilities and the Commission lacks jurisdiction under 66 Pa.C.S. §701—relating to complaints against public utilities—or 66 Pa.C.S. §1501.

In the present matter, Reading is not seeking to construct, relocate, alter, suspended, or abolish its crossing: it is merely seeking to have the Commission enjoin the Department from issuing special hauling permits, to which it has been given statutory authority to do so, and to require the Department to pay for Reading's maintenance responsibilities, a burden that the

³ Section 1102(17) is the predecessor statute to the modern Section 102.

Commission has already placed upon Reading pursuant to prior Commission Orders. *See Application of Aqua Pa., Inc.*, PUC Docket No. A-2011-2264535 (Secretarial Letter, Nov. 22, 2011); *Application of Reading Blue Mountain & N. Ry.*, PUC Docket No. A-2009-2120719 (Secretarial Letter, Aug. 17, 2009). Neither is a valid cause of action under the Code. Essentially, Reading is requesting that the Commission exceed its jurisdictional authority to place additional and unauthorized burdens upon the Department's permitting process; a process that the General Assembly has given the Department the sole discretion to implement. 75 Pa.C.S. §4962. As such, the Commission lacks jurisdiction to adjudicate Reading's complaint.

b. Reading's Complaint is Legally Insufficient

i. The Complaint fails to allege any violation of the Code, Commission's Regulations, or a Commission Order.

Reading filed a formal Complaint form alleging that it is a customer of the Department and that the Department, as a public utility, is permitting "overweight vehicles" to travel over Reading owned and maintained crossings. Pursuant to 66 Pa.C.S. §701, a complaint is proper when:

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done *by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.* Any public utility, or other person, or corporation likewise may complain of any regulation or order of the commission, which the complainant is or has been required by the commission to observe or carry into effect. The Commonwealth through the Attorney General may be a complainant before the commission in any matter solely as an advocate for the Commonwealth as a consumer of public utility services. The commission may prescribe the form of complaints filed under this section.

Id. (emphasis added). A complainant must: (1) allege a public utility has violated "any law" under the Commission's jurisdiction or a Commission order or (2) complain of a Commission

regulation or order to which it is subject to. The latter basis of jurisdiction under 66 Pa.C.S. §701 is not applicable in the instant case. A thorough reading of the complaint demonstrates that Reading has failed to allege that the Department has violated any Commission statute, regulation, or order. Additionally, as discussed *supra*, Reading has failed to allege that the Department is a public utility.

As such, “even if all of the facts set forth in the Complaint are assumed to be true, the Complainant has failed to set forth grounds upon which relief can be granted” and the Department is entitled to have the instant complaint dismissed. *Linda Piekara v. PECO Energy Co.*, 2012 Pa. PUC LEXIS 1645, *6 (Initial Decision Oct. 25, 2012) *aff’d* Docket No. C-2012-2323880 (Final Order Dec. 19, 2012).

ii. Reading’s Requested Allocation of Cost is Not Ripe.

In the alternative, if the Commission finds that it has jurisdiction over the Department and that Reading sufficiently alleges a valid cause of action, the requested relief contained in Paragraph 5(2) of the Complaint is not justiciable. Reading’s demand that the Department reimburse the costs associated with maintenance, replacement, and repair of the subject crossing is not ripe.

The question of ripeness essentially “concerns the timing of a court's intervention in litigation.” *Phila. Entm’t & Dev. Partners, L.P. v. City of Phila.*, 937 A.2d 385, 392 (Pa. 2007). Pennsylvania courts will “generally consider whether the issues are adequately developed and the hardships that the parties will suffer if review is delayed.” *Twp. of Derry v. Pa. Dep’t of Labor & Indus.*, 932 A.2d 56, 60 (Pa. 2007). In determining “adequately developed,” one important factor a court must determine is “whether the claim involves uncertain and contingent events that may not occur as anticipated or at all.” *Id.* at 58.

Reading's requested relief puts it into a legal quagmire. It does not allege that its crossing is in need of any reconstruction, as any claim would potentially subject it to liability under 66 Pa.C.S. §§2702 and 2704. In the same light, Reading requests that the Department reimburse all costs associated with maintenance, replacement, and repair of the crossing; however, Reading has failed to allege that any replacement or repair is necessary or even imminent. The cost of future work at the subject crossing is speculative, at best. Additionally, future conditions of the subject crossing could alter the rationale behind the Commission's allocation of both future costs and maintenance responsibilities, thus requiring a subsequent allocation hearing. To indulge Reading's requested relief would violate the basic principle that "judicial machinery should be conserved for problems that are real and present or imminent, not squandered on problems that are abstract or hypothetical or remote." *Nieves v. Pa. Bd. of Prob. & Parole*, 983 A.2d 236, 241 (Pa. Cmwlth. 2009). Finally, Reading will not face any hardship if it is required to wait until its claim has ripened to pursue reconstruction, relocation, suspension, or abolition of the subject crossing. Reading may simply file a complaint or application, pursuant to 66 Pa.C.S. §2702, with the Commission requesting appropriate action when its cause of action matures.

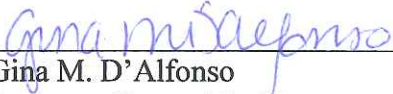
V. Conclusion

The Commission lacks jurisdiction over the instant matter as it has limited jurisdiction and can only adjudicate a claim that arises under clear authority from the General Assembly. Reading failed to allege a present need to construct, relocate, alter or abolish its crossing as required by 66 Pa.C.S. §§2702 and 2704. The Department is not a public utility subject to the provisions of 66 Pa.C.S. §§1501 or 2301. Moreover, the Commission does not have jurisdiction over the Department's special hauling permit program. Additionally, Reading's Complaint does not allege that the Department has violated a provision of the Code, Commission Regulation, or

a Commission order as required by 66 Pa.C.S. §701. As such, Reading has “failed to set forth grounds upon which relief can be granted” and the complaint must be dismissed for lack of jurisdiction and legal insufficiency. The Department respectfully requests that the Commission accept this Brief in Support of its Preliminary Objections, grant said Preliminary Objections, and dismiss the Complaint in this matter.

Respectfully submitted,

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF TRANSPORTATION



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DATED: July 3, 2014

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PENNSYLVANIA, DEPARTMENT OF	:	
TRANSPORTATION	:	
	:	
Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Department's *Brief in Support of its Preliminary Objections* was served upon the parties below by first-class mail, postage prepaid this 3rd day of July 2014:

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COMMONWEALTH OF PENNSYLVANIA
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DATED: July 3, 2014