



17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Main Fax
www.postschell.com

Lindsay A. Berkstresser

lberkstresser@postschell.com
717-612-6021 Direct
717-731-1985 Direct Fax
File #: 2507/140074

January 8, 2015

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Harold Kapelan v. PPL Electric Utilities Corporation
Docket No. C-2014-2458780

Dear Secretary Chiavetta:

Enclosed please find the Preliminary Objectinos of PPL Electric Utilities Corporation to the Complaint of Harold Kapelan. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Lindsay A. Berkstresser

LAB/skr
Enclosure

cc: Certificate of Service

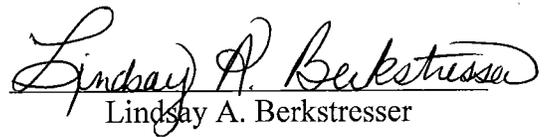
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA FIRST CLASS MAIL

Harold Kapelan
1321 Dartmouth Street
Scranton, PA 18504

Date: January 8, 2015


Lindsay A. Berkstresser

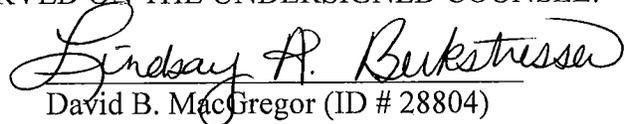
**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Harold Kapelan,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2014-2458780
	:	
PPL Electric Utilities Corporation	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.101, YOU MAY FILE AN ANSWER TO THE ENCLOSED PRELIMINARY OBJECTIONS WITHIN TEN (10) DAYS OF THE DATE OF SERVICE HEREOF. YOUR ANSWER TO THE PRELIMINARY OBJECTIONS MUST BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.

Paul E. Russell (ID # 21634)
Associate General Counsel
PPL Services Corporation
Office of General Counsel
Two North Ninth Street
Allentown, PA 18106
Phone: 610-774-4254
Fax: 610-774-6726
E-mail: perussell@pplweb.com


David B. MacGregor (ID # 28804)
Post & Schell, P.C.
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2808
Phone: 215-587-1197
Fax: 215-587-1444
E-mail: dmacgregor@postschell.com

Of Counsel:

Post & Schell, P.C.

Christopher T. Wright (ID # 203412)
Lindsay A. Berkstresser (ID # 318370)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: 717-731-1970
Fax: 717-731-1985
E-mail: cwright@postschell.com
lberkstresser@postschell.com

Date: January 8, 2015

Attorneys for PPL Electric Utilities Corporation

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Harold Kapelan,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2014-2458780
	:	
PPL Electric Utilities Corporation	:	
	:	
Respondent.	:	

**PRELIMINARY OBJECTIONS OF
PPL ELECTRIC UTILITIES CORPORATION
TO THE COMPLAINT OF HAROLD KAPELAN**

AND NOW, comes PPL Electric Utilities Corporation (“PPL Electric”) and hereby files Preliminary Objections, pursuant to the regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.101, and respectfully requests that the Complaint filed by Harold Kapelan (“Complainant”) be dismissed. In support thereof, PPL Electric states as follows:

I. BACKGROUND

1. PPL Electric furnishes electric distribution, transmission, and default supply services to approximately 1.4 million customers throughout its certificated service territory, which includes all or portions of twenty-nine counties and encompasses approximately 10,000 square miles in eastern and central Pennsylvania. PPL Electric is a “public utility,” an “electric distribution company,” and a “default service provider” as defined in Sections 102 and 2803 of the Pennsylvania Public Utility Code, 66 Pa.C.S. §§ 102, 2803.

2. PPL Electric owns approximately 5,000 miles of transmission lines operating at 69 kV (kilovolts) or higher, approximately 375 substations with a capacity of 10 MVA (megavolt amperes) or more, and approximately 43,000 miles of distribution lines operating at less than 69 kV.

3. Pursuant to Chapters 15 and 28 of the Public Utility Code, PPL Electric has a statutory obligation to provide safe, efficient, and reasonable service and facilities, and to make all repairs or improvements in or to such service or facilities as necessary for the accommodation, convenience, and safety to its customers. PPL Electric is further required to provide reasonably continuous service without unreasonable interruptions or delay. PPL Electric is subject to penalties if it does meet these statutory obligations.

4. Complainant, a residential customer of PPL Electric, owns the property at 150 S. Keyser Ave., Scranton, Pennsylvania.

5. By Secretarial Letter dated December 19, 2014, PPL Electric was served with the above-captioned Complaint.

6. The Complaint alleges a claim of trespass. Specifically, the Complaint avers that PPL Electric allegedly installed a distribution pole on Complainant's property without Complainant's permission and requests that PPL Electric remove the distribution pole from Complainant's property (Complaint ¶¶ 4 and 5).

7. On January 8, 2015, PPL Electric filed an Answer to the Complaint asserting, among other things, that distribution pole in question is located within a public right-of-way and that the Commission lacks subject matter jurisdiction over the trespass claims raised and relief sought in the Complaint.

8. PPL Electric herein files these Preliminary Objections to the Complaint. For the reasons explained below, the Commission lacks jurisdiction over the claim and relief sought in the Complaint and, therefore should be dismissed pursuant to 52 Pa. Code § 5.101(a)(1). In the alternative, the Complaint fails to state a claim upon which relief may be granted because PPL Electric has a statutory right to occupy public rights-of-way and, therefore, the Complaint should be dismissed pursuant to 52 Pa. Code § 5.101(a)(4).

II. STANDARD OF REVIEW

9. Pursuant to the Commission's regulations, preliminary objections in response to a pleading may be filed on several grounds, including:

- (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.

52 Pa. Code § 5.101(a).

10. In ruling on preliminary objections, the Presiding Officer must accept as true all well-pled allegations of material facts as well as all inferences reasonably deducible therefrom. *Stilp v. Cmwlth.*, 910 A.2d 775, 781 (Pa. Cmwlth. 2006) (citing *Dep't of Gen. Serv. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwlth. 2005); accord *Complaint of Nat'l Fuel Gas Distrib. Corp.*

and *Petition for an Order to Show Cause*, Docket No. P-00072343 (December 26, 2007). However, the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007). For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party. *Stilp*, at 781.

11. The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest. 66 Pa. C.S. § 703(b); 52 Pa. Code § 5.21(d). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transportation Corp. v. Pa. Pub. Util. Comm'n*, 623 A.2d 6 (Pa. Cmwlth. 1993).

12. It is a matter of well-settled law that the issue raised and relief sought in the Complaint are beyond the Commission's subject matter jurisdiction. Further, as a matter of law, the Complainant is not entitled to the relief requested because PPL Electric has a statutory right to occupy public rights-of-way. A hearing on such issues and claim for relief would be a fruitless exercise. For these reasons, as more fully explained below, the trespass claim and request for specific performance in the above-captioned Complaint should be dismissed.

III. PRELIMINARY OBJECTIONS:

A. PRELIMINARY OBJECTION NO. 1: THE COMMISSION LACKS JURISDICTION TO DECIDE THE RIGHT-OF-WAY DISPUTE

13. PPL Electric incorporates by reference Paragraphs 1 through 12, *supra*, as if fully set forth herein.

14. The Complaint alleges that PPL Electric's distribution pole is located on the Complainant's private property that is not subject to an easement agreement or right-of-way agreement. The Complaint therefore requests that the distribution pole be removed. (Complaint ¶ 5).

15. Although not the subject of the Complaint, PPL Electric also notes that a guy wire supporting the distribution pole in question is located on Complainant's property. The guy wire attached to the pole in question was installed pursuant to a valid right-of-way obtained from Complainant's predecessor in interest in 1971.

16. These specific allegations in the Complaint relate to questions involving an alleged trespass and whether the utility facilities are located pursuant to a valid easement or right-of-way.

17. The Commission only has those duties, powers, and responsibilities as expressly, or by necessary implication, given to it by the General Assembly. *Jennifer Tomb v. Pennsylvania Electric Company*, Docket No. C-2008-2036378, 2008 Pa. PUC LEXIS 994 (December 8, 2008) (citing *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959)). The Commission must act within, and cannot exceed, its jurisdiction. Further, jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 427 Pa. 81, 235 A.2d 602 (1967).

18. The Commission clearly has stated that it is without subject matter jurisdiction to adjudicate questions involving trespass and whether utility facilities are located pursuant to valid easement or right-of-way agreements. *See, e.g., Boczar v. PPL Electric Utilities Corp.*, Docket No. C-20016332 (February 10, 2003); *Samuel Messina v Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00968225, 1998 Pa. PUC LEXIS 190 (September 23, 1998); *Lou Amati/Amati's*

Service Station v. West Penn Power Company and Bell Atlantic - Pennsylvania, Inc., Docket No. C-00945842 (October 25, 1995) (the Commission ruled that questions involving trespass and whether utility facilities are located pursuant to valid easements are exclusively within the jurisdiction of the Courts of Common Pleas). Indeed, the Pennsylvania Supreme Court held that the Commission does not have the necessary jurisdiction to determine the scope and validity of an easement. *Fairview Water v. Pa. P.U.C.*, 509 Pa. 384, 502 A.2d 162 (1985).

19. The allegations in the Complaint related to whether the distribution pole is located pursuant to valid easement or right-of-way agreements is a matter that is exclusively within the jurisdiction of the Courts of Common Pleas. Consequently, Complainant's trespass claim must be dismissed for lack of Commission jurisdiction.

20. Furthermore, the Commission lacks jurisdiction to adjudicate private contract actions between utilities and other parties. See *Designer Homes, Inc. v. Pennsylvania Power & Light Company*, Docket No. C-934892, 1993 Pa. PUC LEXIS 30 (May 18, 1993) (dismissing Complaint involving right-of-way agreement between utility and third party for lack of jurisdiction). See also *PDJ Cab Company v. Pa. Pub. Util. Comm'n*, 501 A.2d 342 (Pa. Cmwlth. 1988); *Snyder v. Pa. Pub. Util. Comm'n*, 144 A.2d 468 (Pa. Super. Ct. 1958); *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794-795 (1978); *Hoch v. Philadelphia Electric Company*, 492 A.2d 27, 31-32 (Pa. Super. Ct. 1985); *Behrend v. Bell Telephone Company*, 363 A.2d 1152, 1158 (Pa. Super. Ct. 1976).

21. Based on the foregoing, the Commission does not have jurisdiction over this trespass claim. Therefore, the Complaint should be dismissed in its entirety pursuant to Section 5.101(a)(1) of the Commission's regulations, 52 Pa. Code § 5.101(a)(1).

B. PRELIMINARY OBJECTION NO 2: PPL ELECTRIC HAS A STATUTORY RIGHT TO OCCUPY PUBLIC RIGHTS-OF-WAY

22. PPL Electric incorporates by reference Paragraphs 1 through 21, *supra*, as if fully set forth herein.

23. The Complaint alleges that PPL Electric's distribution pole is located on the Complainant's private property that is not subject to an easement agreement or right-of-way agreement. The Complaint therefore requests that the distribution pole be removed. (Complaint ¶ 5).

24. The distribution pole in question is located entirely within a Pennsylvania Department of Transportation ("PennDOT") public right-of-way.

25. The pole was installed within the PennDOT public right-of-way in 1972.

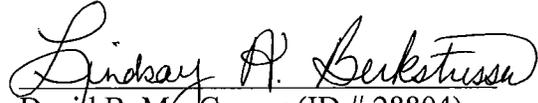
26. PPL Electric has a statutory right to enter upon and occupy streets, highways, and other public places for the transmission and distribution of electricity to or for the public. *See* 15 Pa.C.S. § 1511(e).

27. Because the distribution pole is located pursuant to a statutory right, as a matter of law, the Complaint has failed to state a claim upon which relief may be granted. Therefore, the Complaint should be dismissed in its entirety pursuant to Section 5.101(a)(4) of the Commission's regulations, 52 Pa. Code § 5.101(a)(4).

IV. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that the Complaint be dismissed in its entirety and with prejudice.

Respectfully submitted,



David B. MacGregor (ID # 28804)
Post & Schell, P.C.
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2808
Phone: 215-587-1197
Fax: 215-587-1444
E-mail: dmacgregor@postschell.com

Christopher T. Wright (ID # 203412)
Lindsay A. Berkstresser (ID # 318370)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: 717-731-1970
Fax: 717-731-1985
E-mail: cwright@postschell.com
lberkstresser@postschell.com

Paul E. Russell (ID # 21634)
Associate General Counsel
PPL Services Corporation
Office of General Counsel
Two North Ninth Street
Allentown, PA 18106
Phone: 610-774-4254
Fax: 610-774-6726
E-mail: perussell@pplweb.com

Of Counsel:

Post & Schell, P.C.

Date: January 8, 2015

Attorneys for PPL Electric Utilities Corporation