

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Sean and Linda Pearson	:	
	:	
v.	:	C-2015-2465168
	:	
Duquesne Light Company	:	

ORDER SUSTAINING PRELIMINARY OBJECTION

On or about January 14, 2015, Sean and Linda Pearson (The Complainants or Complainants) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (Duquesne Light or Respondent), a jurisdictional public utility company providing electrical service in the Commonwealth of Pennsylvania. The Complainants are customers of Duquesne Light. They state that there is a utility pole (subject utility pole) in their yard that is rotting and has been leaning dangerously for a period of three years. They also state that Respondent caused damage to the Complainants' property when attempting to replace the subject utility pole.

The Complainants allege that they first informed Respondent about the subject utility pole in 2011. They claim to have a voicemail from Duquesne Light dating from 2011, in which the Duquesne Light representative on the telephone states that Duquesne Light is aware of the damaged subject utility pole and will be out to check its status immediately. The Complainants allege that no one came to check the subject utility pole between 2011 and 2014.

The Complainants also state that in 2014, when Duquesne Light employees finally inspected and attempted to remove the subject utility pole and install another utility pole (replacement utility pole), the Respondent's service truck struck the Complainants' shed and fence. The Complainants assert that this incident caused damage to their shed, their fence, and their retaining wall.

The Complainants state that after the incident a Duquesne Light lineman came to their door and stated that the service truck had gotten stuck on the Complainants' shed, that the lineman was sorry, and that the Complainants should file a claim with Duquesne Light. The Complainants did so, and included an estimate for repairing the damage to their property, which was prepared by Belfor Property Restoration, a company referred to them by their homeowners' insurance company. The estimate, attached to the complaint, estimates that the cost of repairing the damage to the Complainant's property will be \$16,555.95. When the Complainants submitted this information to the Respondent, Duquesne Light denied responsibility for the damage to their property and countered with a settlement offer of \$2,000, attached to the complaint, which the Complainants rejected as being too low and unacceptable.

The Complainants state that no one from Duquesne Light or the Commission has come to inspect the damage that Respondent allegedly caused to their property. They also state that the subject utility pole is still standing and is tied to the replacement utility pole. The Complainants contend that having the poles tied together is an unsafe condition that renders their yard unsafe for use by their children and pets. They assert that they have attempted to resolve this problem with Duquesne Light several times but have not made any progress. The Complainants have attached photographs to the complaint, which they allege depict the unsafe condition created by the subject utility pole, and the damaged that occurred to their property when Respondent's service vehicle stuck on the Complainants' shed.

The Complainants are seeking monetary damages for the actual damage to their property, and monetary compensation for their suffering, stress, lack of sleep, inability to use their yard, and the unsafe situation created by the subject utility pole.

On February 20, 2015, Respondent filed an answer to the complaint. Duquesne Light denies that there are any reliability, safety, or quality problems with regard to the subject utility pole, which is located in the alleyway behind the Complainants' property.

Respondent states that the Complainants initially contacted Duquesne Light on April 29, 2011, regarding a tree in the Complainants' backyard that had been damaged by a

storm, and was located near the subject utility pole. Duquesne Light assessed the subject utility pole and determined that there were no structural issues with, or imminent danger posed by, the subject utility pole. Duquesne Light's vegetation management crew assessed the storm-damaged tree and determined it would not fall on the power lines, but removed the damaged tree limb as a customer courtesy to the Complainants. Respondent states that it did not hear from the Complainants about the subject utility pole for more than three years after this incident.

On July 15, 2014, after issuing the appropriate termination notices, Respondent terminated service to the Complainants' property due to nonpayment. When the Complainants contacted Duquesne Light on the same day to have service restored, they informed Respondent that the subject utility pole was leaning. A Duquesne Light troubleshooter was dispatched to inspect the subject utility pole the same day. The troubleshooter determined that the subject utility pole was structurally sound, but Respondent agreed to replace the subject utility pole.

On September 15, 2014, after securing the appropriate permits, Respondent installed the replacement utility pole, partially removed the subject utility pole, and secured the two utility poles together for support. Respondent states that the subject utility pole cannot be fully removed because lines from two other utility companies remain affixed to the pole. Duquesne Light has notified the two other utility companies of the need to transfer their lines to the replacement utility pole, since Duquesne Light is not authorized to transfer other utility companies' lines from one utility pole to another. Respondent states that once the other utility companies transfer their lines to the replacement utility pole, Duquesne Light will remove the subject utility pole entirely.

Respondent admits that on September 15, 2014, its service vehicle slid on the unpaved surface of the alleyway behind the Complainants' home after installing the replacement utility pole, and that the service vehicle came to a stop at the edge of the Complainants' shed. Respondent, however, denies that the service vehicle caused the alleged damage to the shed and surrounding property and as such denies that it is responsible for the alleged damage.

Regarding the photographs provided by the Complainants and attached to the Complaint, Respondent states that the photographs speak for themselves and denies all representations made by Complainants regarding those images.

Also on February 20, 2015, Respondent filed Preliminary Objections to the Complaint. Respondent states that the Commission lacks jurisdiction to award monetary damages. Therefore, Respondent seeks to have the complaint dismissed with prejudice to the extent that it seeks recovery of monetary damages.

On March 11, 2015, the matter was assigned to me by motion judge assignment notice.

The time for filing a response to the answer or preliminary objections has run, and no responsive pleading has been filed. The preliminary objections are ready for decision. For the reasons set forth below, I will grant the preliminary objections in part and strike the portion of the complaint requesting monetary damages.

Commission regulations permit the filing of preliminary objections. 52 Pa. Code §§ 5.101(a)(1)-(7). Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

Commission regulations provide:

§ 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(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).

In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the Complainants, recovery or relief is possible. Dept. of Auditor General, et al v. SERS, et al., 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003), 2003 Pa. Commw. LEXIS 849; P.J.S. v. Pa. State Ethics Comm'n, 669 A.2d 1105 (Pa.Cmwlth. 1996) 1996 Pa. Commw. LEXIS 11. Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. Boyd v. Ward, 802 A.2d 705 (Pa.Cmwlth. 2002) 2002 Pa. Commw. LEXIS 580. All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. Ridge v. State Employees' Retirement Board, 690 A.2d 1312 (Pa.Cmwlth. 1997) 1997 Pa. Commw. LEXIS 148.

Therefore, the preliminary objections can be granted only if recovery or relief is not possible after all of the Complainants' averments in the complaint are viewed as true for purposes of deciding the preliminary objections, using only those facts specifically admitted.

Here, the Respondent's preliminary objections assert lack of Commission jurisdiction, pursuant to 52 Pa.Code §§ 5.101(a)(1). The Respondent's preliminary objections argue that the Commission should dismiss the complaint because the Commission lacks jurisdiction to award monetary damages. This is not correct.

The Respondent is confusing the Commission's power or authority with the Commission's subject matter jurisdiction. The difference was explained by the Pennsylvania Supreme Court in Riedel v. The Human Relations Comm'n of the City Of Reading, 739 A.2d 121, 124 (Pa. 1999):

Jurisdiction and power are not interchangeable although judges and lawyers often confuse them - Hellertown Borough Referendum Case, 354 Pa. 255, 47 A.2d 273 (1946). Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. Power, on the other hand, means the ability of a decision-making body to order or effect a certain result. Delaware River Port Auth. v. PA Public Utility Commission, 408 Pa. 169, 178, 182 A.2d 682, 686 (1962); see also Beltrami Enterprises, Inc. v. Commonwealth of PA, Dep't of Environmental Resources, 159 Pa. Commw. 72, 632 A.2d 989, 993 (Pa. Commw. 1993) (fact that administrative agency may not have power to afford relief in particular case presented is of no moment to determination of its jurisdiction over general subject matter of controversy).

See also, In Re: Melograne, 812 A.2d 1164 (Pa. 2002); Bell Telephone Co. of Pa. v. Philadelphia Warwick Co., 50 A.2d 684 (Pa. 1947).

A request for relief that is not legally available in the cause of action pleaded is "impertinent matter" in the sense that it is irrelevant to that cause of action. A preliminary objection in the nature of a motion to strike off impertinent matter is the appropriate method to challenge an erroneous prayer for damages. Hudock v. Donegal Mut. Ins. Co. 264 A.2d 688 (Pa. 1970). The Respondent's preliminary objections should have asserted the inclusion of impertinent matter in the complaint, pursuant the 52 Pa.C.S. § 5.101(a)(2). I will treat the Respondent's preliminary objections as a request to strike impertinent matter pursuant to that section.

The facts alleged in the Complainants' complaint, if proven true, could constitute possible unreasonable service by the Respondent in violation of 66 Pa. Code § 1501. The Commission has jurisdiction over service disputes between public utilities operating in Pennsylvania and their customers. The Commission has exclusive jurisdiction over matters involving the reasonableness, adequacy and sufficiency of services rendered by a public utility. Behrend v. Bell Telephone Co. of Pennsylvania, 431 Pa. 63, 243 A.2d 346 (1968), Gasparro v. Pa. Pub. Util. Comm'n, 814 A.2d 1282 (Pa.Cmwlth. 2003), Bell Telephone Co. of Pennsylvania v. Sanner, 375 A.2d 93 (Pa.Super. 1977). In the event that the Respondent's actions in this case constituted unreasonable service, pursuant to 66 Pa. Code § 1501, a civil penalty may be appropriate, pursuant to 66 Pa. C.S. §3301.

However, even if the facts alleged in the Complainants' complaint were proven to be true, the Commission could not award the relief requested by the Complainants. The Complainants' request that the Respondent reimburse the Complainants for the cost of repairing the damage to their property is a request for compensation and is beyond the authority the General Assembly has granted to the Commission.

Although it has general jurisdiction over service disputes between public utilities operating in Pennsylvania and their customers, 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. The Public Utility Code simply does not grant the Commission the authority to award damages in this case. There is no question that the Commission lacks authority to award damages. Terminato v. Pa. National Insurance Co., 645 A.2d 1287 (Pa. 1994); Elkin v. Bell Tel. Co. of Pa., 420 A.2d 371 (Pa. 1980); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977); Ostrov v. I.F.T., Inc., 586 A.2d 409 (Pa. Super. 1991); Poorbaugh v. Pa. Pub. Util. Comm'n., 666 A.2d 744 (Pa. Cmwlth. 1995). It is therefore appropriate to strike off the Complainant's request for damages as impertinent matter, pursuant to 52 Pa.C.S. § 5.101(a)(2).

The Complainants also indicate that Duquesne Light is responsible for the damages caused to the Complainants' property. To the extent that the Complainants are

requesting that the Commission determine that the Respondent was negligent, the Commission lacks the authority to make such a determination. The Commission can only make a determination as to whether the Respondent's conduct violated the Public Utility Code or Commission regulations, not whether its conduct was negligent. It is the province of the courts, not the Commission, to make determinations of negligence or other causes of action that do not require the Commission's specialized knowledge. Such cases can be fully and adequately addressed before the courts. DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374 (1982).

As stated earlier, the facts alleged in the Complainants' complaint, if proven true, could constitute possible unreasonable service by the Respondent in violation of the Public Utility Code or Commission regulations. The Respondent's answer contests the portions of the complaint alleging unreasonable service. There is therefore a dispute of facts regarding these allegations. A hearing will be necessary to resolve the dispute of facts regarding the complaint's allegations of unreasonable service.

As set forth above, the Commission lacks the authority to award damages to the Complainants. Sustaining the Respondent's preliminary objections by striking the relief requested as impertinent matter is appropriate under the circumstances.

I will strike that portion of the complaint requesting monetary damages. I will direct that the remaining issues raised in the complaint be set for hearing. I will issue the following order.

ORDER

THEREFORE,


IT IS ORDERED:

1. That the preliminary objections filed by Duquesne Light Company at Docket No. C-2015-2465168 are sustained.

2. That the request for relief in the form of monetary damages set forth in the complaint of Sean and Linda Pearson at Docket No. C-2015-2465168 is stricken.

3. That the remaining issues set forth in the complaint of Sean and Linda Pearson at Docket No. C-2015-2465168 shall be scheduled for a hearing before an administrative law judge.

Dated: March 20, 2015



David A. Salapa
Administrative Law Judge

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