

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THOMAS JONES,	:	
	:	
Complainant	:	
	:	Docket No. C-2015-2505831
v.	:	
	:	
	:	
SALSGIVER TELECOM, INC.	:	
	:	
Respondent	:	

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**NOTICE TO PLEAD**

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TO: Thomas Jones

Pursuant to 52 Pa. Code § 5.101, you are hereby notified that an answer to the enclosed Preliminary Objections of Salsgiver Telecom, Inc. ("Salsgiver Telecom") must be filed within 10 days of the date of service of the Preliminary Objections.

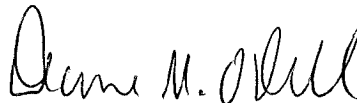
All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for Salsgiver Telecom and where applicable, the Administrative Law Judge presiding over the issue.

File with:

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

With a copy to:

Deanne M. O'Dell, Esquire  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101



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Deanne M. O'Dell, Esquire

Date: October 20, 2015

Attorney Salsgiver Telecom, Inc.

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**PRELIMINARY OBJECTIONS  
BY SALSGIVER TELECOM, INC.**

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Pursuant to 52 Pa. Code § 5.101, Salsgiver Telecom, Inc. (“Salsgiver Telecom” or “Respondent”) submits the following Preliminary Objections to the Formal Complaint or Thomas Jones (“Mr. Jones” or “Complainant”) seeking dismissal of the Formal Complaint. Pursuant to 52 Pa. Code §§ 5.61 and 5.101(d), Respondent is also filing an Answer to the complaint.

As set forth below, the Commission lacks jurisdiction to adjudicate this complaint because the Commission does not have jurisdiction regarding Salsgiver Telecom’s right to use the public right-of-way within the control of the Pennsylvania Department of Transportation (“PennDOT”). Even if jurisdiction does exist (which it does not), the complaint must be dismissed based on legal insufficiency of the complaint because Salsgiver Telecom’s selection, and use, of PennDOT’s right-of-way for poles and fiber-optic cables does not violate any provision of the Public Utility Code, or other statute the Commission has jurisdiction to administer, or of any order, rule or regulation of the Commission. In further support of these Preliminary Objections, Salsgiver Telecom states as follows:

## INTRODUCTION

1. Mr. Jones' Formal Complaint seeks the removal of poles located on the street where his home is located; and, the relocation of fiber-optic cables from the poles to ones located across the street from where his home is located. The newly erected poles which Mr. Jones want removed, however, were located within a right-of-way controlled by the Pennsylvania Department of Transportation ("PennDOT") and where placed there by Salsgiver Telecom after acquiring Highway Occupancy Permits ("HOPs") granted by PennDOT. The previously existing poles to which Mr. Jones' seeks the Commission to direct Salsgiver Telecom to relocate its fiber-optic cables are located within a right-of-way owned by Berlin Borough. As correctly stated in the complaint, Salsgiver Telecom and Berlin Borough were unable to reach a reasonable agreement to enable Salsgiver Telecom to locate its fiber-optic cables on those existing poles.
2. For the reasons stated herein, the Commission lacks jurisdiction to adjudicate Salsgiver Telecom's ability and right to use PennDOT's public right-of-way for above-ground poles and facilities. The relief requested by Mr. Jones will require the interpretation of the underlying right-of-way held by the PennDOT and/or the rights of Berlin Borough. Alternatively, the Formal Complaint should be dismissed for lack of legal sufficiency.

## PRELIMINARY OBJECTIONS

### Lack of Jurisdiction

3. Salsgiver Telecom submits, pursuant to 52 Pa. Code § 5.101(a)(1),<sup>1</sup> that the Commission lacks jurisdiction over the subject issues raised by the Formal Complaint. Paragraphs 1 to 2 of these Preliminary Objections are incorporated herein by reference.
4. Not all acts or functions performed by a public utility fall under the jurisdiction of the Commission. Rather, as an administrative agency, the Commission must act within and cannot exceed its jurisdiction.<sup>2</sup> The Commission is not a “super board” of directors<sup>3</sup> and is not authorized to micromanage the day-to-day operations of the utilities under their jurisdiction.<sup>4</sup>
5. The underlying essence of the Formal Complaint is a challenge, by Mr. Jones, to Salsgiver Telecom’s ability and right to use PennDOT’s public right-of-way for above-ground poles and facilities. As such, the primary issue raised by the Formal Complaint is the scope and validity of PennDOT’s right-of-way and the HOPs issued by PennDOT to Salsgiver Telecom to use the right-of-way.

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<sup>1</sup> 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. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. PUC*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. PUC*, 103 A.2d 502 (Pa. Super. 1954).

<sup>2</sup> See, e.g., *Feingold v. Bell of Pa*, 383 A.2d 791 (Pa. 1977).

<sup>3</sup> See, e.g., *Bell Tel. Co. of Penna. v. Driscoll*, 118 A.2d 912, 916 (Pa. 1941) (PUC is not a super board of directors for public utilities).

<sup>4</sup> See, e.g., *Joint Application of Verizon Commc'ns, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, Docket No. A-310580F0009, Final Order entered January 11, 2006, *affirmed*, *Popowsky v. PUC*, 937 A.2d 1040 (Pa. 2007).

6. To be clear, Salsgiver Telecom has not condemned any portion of Mr. Jones' property. Salsgiver Telecom is using an **existing** public right-of-way which is owned by PennDOT. PennDOT has granted Salsgiver Telecom the authority to erect its poles in the right-of-way as evidenced by the HOPs<sup>5</sup> issued by PennDOT to Salsgiver Telecom.
7. That being said, property issues such the location of utility facilities pursuant to valid rights-of-way are within the exclusive jurisdiction of the Courts of Common Pleas.<sup>6</sup> The Commission does not have jurisdiction to determine the scope and validity of any right-of-way.<sup>7</sup> Simply put, the Commission is not the proper forum to resolve a controversy which will determine property rights because the Commission cannot adjudicate the property rights held: (a) by PennDOT under the right-of-way; or, (b) by Salsgiver Telecom under the HOPs issued by PennDOT.
8. The Commission lacks jurisdiction over the issuance of HOPs by PennDOT to Salsgiver Telecom.<sup>8</sup> PennDOT holds the underlying right-of-way and issued the subject HOPs to Salsgiver Telecom pursuant to PennDOT's regulations.<sup>9</sup> PennDOT's regulations are intended, *inter alia*, "for the purpose of insuring the structural integrity of the highway,

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<sup>5</sup> The HOPs are referenced in the attachment to the Formal Complaint, and are being provided as part of Salsgiver Telecom's Answer to the Formal Complaint.

<sup>6</sup> See, e.g., *Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937 (May 28, 2008).

<sup>7</sup> See e.g., *Fairview Water Co. v. PUC.*, 502 A.2d 162 (Pa. 1985); *Marc Chervenitski, Sr. v. PPL Electric Utilities Corporation*, PUC Docket No. C-2014-2423862, Final Order (Act 294) entered August 1, 2014 adopting the Initial Decision dated July 1, 2014.

<sup>8</sup> 2 Pa. C.S. § 702 ("Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)").

<sup>9</sup> See 67 Pa. Code, Chapters 459 (relating to occupancy of highways by utilities). If the Department determines that the structures, equipment or property poses a threat to the public safety, the Department can bring an action against the permittee. See, e.g., 67 Pa. Code § 459.7(4)(ii).

economy of maintenance, preservation of proper drainage and safe and convenient passage of traffic.”<sup>10</sup>

9. Regarding the pre-existing poles owned by Berlin Borough, as Complainant correctly states, Salsgiver Telecom and Berlin Borough were not able to negotiate a reasonable agreement permitting Salsgiver Telecom to locate its fiber-optic cables on those poles.<sup>11</sup> The Commission lack jurisdiction to mandate that Berlin Borough reach an agreement with Salsgiver Telecom regarding the use of the Borough’s poles and right-of-way by Salsgiver Telecom.<sup>12</sup> Negotiation is not subject to the Commission’s jurisdiction, and the Commission cannot mandate public “input into the process” by Mr. Jones (or other residents of the Borough). In fact, the issue of negotiation with Berlin Borough is moot because (a) Salsgiver Telecom and the Borough were not able to reach an agreement; and, (b) Salsgiver Telecom received rights from PennDOT and has installed poles consistent with this authority.
10. The Commission also has no jurisdiction regarding Mr. Jones’ concern about a decrease in his property value due to the pole.<sup>13</sup> The Commission does not have jurisdiction to

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<sup>10</sup> 67 Pa. Code § 459.2 (purpose and application).

<sup>11</sup> Generally speaking, pole attachment negotiations must be done in accordance with the applicable requirements under the Borough Code, 53 Pa. C.S. § 45101 et seq., the Sunshine Act, 65 Pa. C.S. § 701 et seq., and the Right-to-Know Law, 65 P.S. §§ 67.101, et seq. None of those laws are within the Commission’s jurisdiction.

<sup>12</sup> The issue of negotiation with Berlin Borough should be deemed to be moot because (a) Salsgiver Telecom received rights from the Department, and (b) Salsgiver Telecom and the Borough were not able to reach an agreement. *See* the attachment to the Formal Complaint.

<sup>13</sup> *See Robert Bosco v. PECO Energy Company*, PUC Docket No. C-2010-2153408, Final Order (Act 294) entered April 12, 2012 adopting the Initial Decision dated February 16, 2012 (citation omitted).

award damages, which includes compensation for alleged losses in property devaluation or otherwise.<sup>14</sup>

11. Salsgiver Telecom respectfully requests that the Formal Complaint be dismissed because of a lack of jurisdiction.

### **Legal Sufficiency Of The Complaint**

12. Salsgiver Telecom submits this alternative preliminary objection, pursuant to 52 Pa. Code § 5.101(a)(4), challenging the legal insufficiency of the Complaint. Paragraphs 1 to 11 of these Preliminary Objections are incorporated herein by reference.
13. Salsgiver Telecom's selection, and use, of PennDOT's right-of-way for poles and fiber-optic cables did not and does not violate any provision of the Public Utility Code, or other statute the Commission has jurisdiction to administer, or of any order, rule or regulation of the Commission. The Commission's regulations pertaining to the siting and construction of electric transmission lines, 52 Pa. Code §§ 57.71, et seq., do not require telecommunication companies to file an application with the Commission approval to locate, site and construct above-ground poles and facilities within an existing public right-of-way.
14. Salsgiver Telecom respectfully requests that the Administrative Law Judge sustain its preliminary objection by way of demurrer and dismiss the Formal Complaint in its entirety.

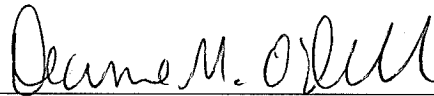
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<sup>14</sup> *Id. See, e.g., Terminato v. Pa. National Insurance Co.*, 645 A.2d 1287 (Pa. 1994); *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold, supra*.

**CONCLUSION**

WHEREFORE, Salsgiver Telecom respectfully requests that this Commission (a) grant the Salsgiver Telecom's preliminary objections; (b) dismiss the Formal Complaint in its entirety; (d) deny all of the relief requested by Mr. Jones; and (d) grant any other relief to Salsgiver Telecom that is deemed to be reasonable and appropriate.

Respectfully submitted,



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Date: October 20, 2015

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