

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Vale Vista Associates, LP; Donald J. Ivill and	:	
Gloria Ivill t/a Ivill Development; General	:	
Contractors, Inc., d/b/a General Industries	:	
	:	C-2015-2517345
v.	:	
	:	
West Penn Power Company	:	

**INITIAL DECISION SUSTAINING PRELIMINARY OBJECTIONS
AND DISMISSING COMPLAINT**

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

Property owners filed a complaint against an electric utility objecting to the utility's attempts to remove trees as part of its vegetation management plan from the owners' property, pursuant to an easement agreement granting the utility access to the owners' property. This decision dismisses the complaint because the Pennsylvania Public Utility Commission (Commission) lacks subject matter jurisdiction over disputes involving real property rights.

HISTORY OF THE PROCEEDING

On December 11, 2015, Vale Vista Associates, LP (Vale Vista); Donald J. Ivill and Gloria Ivill t/a Ivill Development (Ivills); and General Contractors, Inc., d/b/a General Industries (General) (collectively, Complainants) filed a complaint with the Commission against West Penn Power Company (Respondent). The complaint alleges that on January 13, 1987, Donald J. Ivill

and his father purchased property at 15 Arentzen Boulevard, Charleroi, Pennsylvania. A copy of the deed is attached to the complaint, marked as Exhibit A.

The complaint alleges that the property at 15 Arentzen Boulevard has been subdivided into two parcels. A copy of the plan of lots is attached to the complaint, marked as Exhibit B.

The complaint states Vale Vista is the current owner of Lot 1 of the subdivided property. Donald J. Ivill is the general partner of Vale Vista. A copy of Vale Vista's deed is attached to the complaint, marked as Exhibit C.

The complaint asserts the Ivills own the remaining portion of the subdivided property at 15 Arentzen Boulevard. A copy of the Ivills' deed is attached to the complaint, marked as Exhibit D.

According to the complaint, General currently occupies the property at 15 Arentzen Boulevard. Donald J. Ivill is the president of General.

The complaint alleges that on or about the time Donald J. Ivill and his father acquired the property at 15 Arentzen Boulevard, they planted trees on the property. Copies of the photographs of the trees are attached to the complaint, marked as Exhibit E.

The complaint avers that on November 2, 2015, the Respondent sent correspondence to the Ivills indicating that the Respondent wanted to remove 17 trees located in its 138 kV transmission corridor located on the property at 15 Arentzen Boulevard as part of the Respondent's vegetation management plan. A copy of the correspondence is attached to the complaint, marked as Exhibit F.

In its November 2, 2015, correspondence, the Respondent refers to three easement agreements as authorizing it to remove the 17 trees. Copies of the easement agreements are attached to the complaint, marked as Exhibit G.

The complaint argues that two of the three easement agreements only grant the Respondent the authority to cut or trim trees or shrubbery, not remove them. According to the complaint, the third easement agreement grants the Respondent the authority to remove trees but that the third easement agreement is not applicable to the property at 15 Arentzen Boulevard.

The complaint contends that the Respondent has an obligation, pursuant to 66 Pa.C.S. § 1501, to provide adequate, safe and reasonable service. The complaint argues that vegetation management is a service, pursuant to 66 Pa.C.S. § 1501 and that removing the 17 trees does not constitute reasonable service.

The complaint contends that the scope of an express easement must be narrowly construed and that, as a matter of law, none of the three easement agreements referred to by the Respondent specifically grant the Respondent the right to remove the 17 trees from the property at 15 Arentzen Boulevard. The complaint concludes that the Respondent's attempt to remove the 17 trees when it has no right to do so is inadequate, unreasonable service in violation of 66 Pa.C.S. § 1501. The complaint requests that the Commission prohibit the Respondent from removing the trees from the property at 15 Arentzen Boulevard

The Respondent filed an answer with new matter and preliminary objections on December 31, 2015. The answer admits that on January 13, 1987, Donald J. Ivill and his father purchased the property at 15 Arentzen Boulevard. The answer indicates lack of knowledge about the assertions in the complaint concerning subsequent subdivision and conveyances and therefore denies those assertions.

The answer acknowledges the November 2, 2015 correspondence asserting that the correspondence speaks for itself. The answer denies that the easement agreements referenced in the November 2, 2015 correspondence prohibit the Respondent from removing the 17 trees from the Complainants' property pursuant to the Respondent's vegetation management plan. The answer asserts that the Commission lacks jurisdiction to interpret the validity or scope of the easement agreements.

The new matter argues that the Commission lacks jurisdiction to determine property rights or the scope and validity of easements. The new matter concludes that determination of property rights and the scope and validity of easements is with the jurisdiction of the courts. The answer with new matter requests that the Commission dismiss or deny the complaint.

The preliminary objections contend that the subject matter of the Complainants' complaint is outside the Commission's jurisdiction. The preliminary objections point out that the Commission lacks jurisdiction over claims that arise from real property disputes. According to the preliminary objections, the allegations in the complaint assert that the Respondent is attempting to act beyond the scope of its property rights set forth in the easement agreements and that the Complainants' property rights are being violated as a result. The preliminary objections conclude that the Commission lacks jurisdiction to resolve disputes involving property rights. The preliminary objections request that the Commission dismiss the Complainants' complaint.

On January 19, 2016, the Complainants filed an answer to the Respondent's new matter. The answer to new matter reiterates the Complainants' assertion that vegetation management is within the Commission's jurisdiction. The new matter contends that the plain language of the three easement agreements does not permit the Respondent to remove trees from the property at 15 Arentzen Boulevard. The answer to new matter requests that the Commission prohibit the Respondent from removing the trees from the property at 15 Arentzen Boulevard.

Also on January 19, 2016, the Complainants filed an answer to the Respondent's preliminary objections. The answer contends that the Respondent's obligation to provide reasonable service includes vegetation management. Therefore, the Commission has subject matter jurisdiction to adjudicate the claims set forth in the Complainants' complaint.

The answer to preliminary objections asserts that by their plain language the three easement agreements do not permit removal of the trees from the property at 15 Arentzen Boulevard. Therefore, the answer contends that the Commission must accept as true the

assertions that the easement agreements do not permit the Respondent's work plan, including the proposed removal of the trees from the property at 15 Arentzen Boulevard. The answer to preliminary objections requests that the Commission prohibit the Respondent from removing the trees from the property at 15 Arentzen Boulevard.

By notice dated February 9, 2016, the Commission notified the parties that it had assigned the case to me as motion judge. The preliminary objections are ready for decision. For the reasons set forth below, I will sustain the preliminary objections and dismiss the complaint.

FINDINGS OF FACT

1. The Complainants in this case are Vale Vista Associates, LP; Donald J. Ivill and Gloria Ivill t/a Ivill Development; and General Contractors, Inc., d/b/a General Industries.
2. The Respondent in this case is West Penn Power Company.
3. On December 11, 2015, the Complainants filed a complaint with the Commission against the Respondent.
4. The Respondent filed an answer with new matter on December 31, 2015.
5. On December 31, 2015, the Respondent filed preliminary objections.
6. On January 19, 2016, the Complainants filed an answer to the Respondent's new matter.
6. On January 19, 2016, the Complainants filed an answer to the Respondent's preliminary objections.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. 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.

Here, the Respondent's preliminary objections assert lack of Commission jurisdiction pursuant to 52 Pa.Code § 5.101(a)(1).

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). A preliminary objection asserting lack of Commission jurisdiction, pursuant to the Commission's Rules of Practice and Procedure, is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate

Traveller Services, Inc. v. Pa. Dept. of Environment 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 follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa.Cmwlt. 1988). The Commission must view the factual assertions in the complaint in this case in the light most favorable to the Complainants and should dismiss the complaint only if it appears that the Complainants would not be entitled to relief under any circumstances as a matter of law. Equitable.

The Commission regulation at 52 Pa.Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa.Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

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. Pa. Pub. Util. Comm'n, 563 A.2d 557 (Pa.Cmwlt. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa.Cmwlt. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa.Cmwlt. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa. Super. 1954).

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. Tod and Lisa Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937 (Opinion and Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n., 43 A.2d 348 (Pa.Super. 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 decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa.Cmwlt. 1992) alloc. denied 637 A.2d 293 (Pa. 1993).

Viewing the factual assertions in the complaint in this case in the light most favorable to the Complainants for purposes of disposing of the preliminary objections, the Complainants own or occupy the property at 15 Arentzen Boulevard. One of the Complainants, Donald J. Ivill planted trees on the property.

The Respondent wants to remove 17 trees located in its 138 kV transmission corridor located on the property at 15 Arentzen Boulevard as part of its vegetation management plan. The Respondent has right of way agreements for the portion of the property where its transmission facilities are located. The Complainants dispute that the right of way agreements authorize the Respondent to remove the trees from the property.

Accepting the facts alleged in the complaint as true for purposes of disposing of its preliminary objection, the Respondent alleges that the complaint raises issues that are outside the subject matter jurisdiction of the Commission. I agree. Both the Pennsylvania Supreme Court and the Commission have previously addressed this issue.

In Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission lacks jurisdiction to determine the scope and validity of an easement. The Commission has determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110

(Opinion and Order entered July 3, 2003); Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Opinion and Order entered September 15, 1999).

Concerning the scope and validity of easements, the Commission has described the limits of its jurisdiction in several cases. 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 that it lacked jurisdiction to determine property rights concerning these easements.

In Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic Pennsylvania, Inc., Docket No. C-00945842 (Final Order entered October 25, 1995), the Commission stated that real property issues, such as trespass and whether utility facilities were located pursuant to a valid easement are within the exclusive jurisdiction of the Courts of Common Pleas.

In Messina v Bell Atlantic-Pennsylvania, Docket No. C-00968225 (Opinion and Order entered September 23, 1998), the Commission stated that it could adjudicate cases involving the existence rather than the scope and validity of an easement.

Finally, in Stavnicky v PPL Electric Utilities Corp., Docket No. C-20043368 (Final Order entered July 13, 2005) (Stavnicky), the Commission held that its subject matter jurisdiction in right of way disputes extended only to cases where there was no written documentation of an easement. If the utility produced a document purporting to show a grant of authority for an easement concerning a complainant's property, the Commission's inquiry should be at an end. The Commission determined that it lacked jurisdiction because the utility presented written documentation of its easements.

Here, the Complainants have produced the three easement agreements. The issue raised in the Complainants' complaint is whether the any of the easement agreements authorize the Respondent to remove the trees from the easement.

Accepting as true all the facts alleged in the complaint, the Complainants are not entitled to relief as a matter of law. The dispute alleged in the complaint is whether the Respondent may remove trees from its easement pursuant to its easement agreements. Since the parties have produced easement agreements, the Commission's decision in Stavnicky requires that the Commission dismiss the Complainants' complaint.

As set forth above, the Commission lacks subject matter jurisdiction to adjudicate real property disputes, including the scope and validity of easements. Since the Commission's jurisdiction does not extend to adjudicating real property disputes, I will sustain the preliminary objections and enter the following order.

CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction to resolve property rights controversies. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Order entered July 3, 2003).
2. The Commission lacks jurisdiction to determine the scope and validity of an easement. Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985)
3. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2015-2517345 be dismissed.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by West Penn Power Company at Docket No. C-2015-2517345 are sustained.
2. That the complaint of Vale Vista Associates, LP; Donald J. Ivill and Gloria Ivill t/a Ivill Development; and General Contractors, Inc., d/b/a General Industries at Docket No. C-2015-2517345 against West Penn Power Company is dismissed for lack of jurisdiction.
3. That the docket at Docket No. C-2015-2517345 is marked closed.

Date: February 16, 2016

/s/
David A. Salapa
Administrative Law Judge