

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paula Ponte	:	
	:	
v.	:	C-2016-2559745
	:	
Verizon Pennsylvania, LLC	:	

ORDER DENYING PRELIMINARY OBJECTIONS

On July 15, 2016, Paula Ponte (Complainant) filed with the Pennsylvania Public Utility Commission (Commission) a formal complaint against Verizon Pennsylvania, LLC (Verizon or Respondent), Docket Number C-2016-2559745. In her complaint, Complainant alleges that utility poles and associated lines owned by Verizon at 1840 Perkiomenville Road, Perkiomenville, Pennsylvania were too close to the Complainant's building and created an unsafe condition at the property and prevented safe building maintenance on the side of the building adjacent to the lines and poles.

In addition, Complainant alleges that certain wires making up these lines were also creating an unsafe circumstance in a nearby intersection as a result of their placement and low hanging nature over the roadway. Complainant has filed a complaint with this Commission for the purposes of directing Verizon to either replace or relocate the offending poles and wires and thus correct what the Complainant believes to be a dangerous condition.

On August 23, 2016 Verizon filed an answer and new matter to this complaint. In its answer, Verizon admitted or denied the various elements of the complaint. Specifically, Verizon averred that the complaint does not relate to telephone service to the Complainant as the Complainant is not a customer. Rather, the complaint relates only to the location of a pole near the Complainant's property. In addition, Verizon asserted that the pole had been placed in 1987

and is within a public right-of-way which dated back to February 19, 1967. Verizon specifically denied the allegation that the placement of this pole prevented safe building maintenance to the Complainant's property.

In both its answer and new matter, Verizon averred that because the pole is located in a public right-of-way, the Commission lacked subject matter jurisdiction over the complaint and the Complainant's demand that the utility pole be relocated for the purposes of adding a fire escape to the side of the Complainant's building.

Verizon's answer and new matter included a notice to plead advising the Complainant that she would be required to file a response within twenty days. The deadline to file an answer to this new matter was August 15, 2016. 52 Pa.Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). The Complainant did not file an answer.

Also on August 23, 2016, Verizon filed a preliminary objection to the complaint. In short, this preliminary objection argued that because the complaint was seeking an order from the Commission to relocate a pole located in a public right-of-way, the complaint should be dismissed in its entirety because the Commission has no subject matter jurisdiction to adjudicate public right-of-way issues.

Verizon's preliminary objection included a notice to plead advising the Complainant that she would be required to file a response within twenty days. The deadline to file an answer to this preliminary objection was August 15, 2016. 52 Pa.Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). The Complainant did not file an answer.

On December 29, 2016 a motion judge assignment notice assigned this matter to the undersigned for the purposes of reviewing and ruling on Verizon's preliminary objection and to resolve the issues which have arisen during the preliminary phase of this proceeding. Verizon's preliminary objection is now ready for disposition. For the reasons discussed below, the objection will be denied.

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:

§ 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 a proceeding.

Here, Verizon'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.Cmwlth. 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.Cmwlth. 1992) alloc. denied 637 A.2d 293 (Pa. 1993).

Viewing the factual assertions in the complaint in this case in their entirety and in the light most favorable to Complainant for purposes of disposing of the preliminary objection, Complainant has made several allegations with respect to the utility pole and lines in question near her property.

First, the utility lines are too close to the building which she owns at 1840 Perkiomenville Road.

Second, certain wires require replacement because of their bare condition.

Third, the proximity of the lines or wires and poles preclude her from installing a fire escape to the third floor of the building and therefore precludes any emergency ingress or egress from the west side of the building.

Fourth, the lines or wires prevent safe building maintenance.

Fifth, the lines or wires run across an adjacent intersection into a "tangle" where they are not properly supported and therefore droop and cause a dangerous condition.

In its answer, new matter and preliminary objection, Verizon repeatedly asserts that because its pole is located within a long-established public right-of-way, the Commission has no subject matter jurisdiction to adjudicate public right-of-way issues. This assertion is correct and well-supported by relevant case law.

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.

If the averments of the Complainant's complaint related to the scope and validity of Verizon's enjoyment of the public right-of-way, the preliminary objection would prevail. However, the complaint is devoid of any such allegations. The Complainant does not argue that there is no existing right-of-way or that Verizon does not correctly enjoy its use and benefit. The complaint does not per se raise issues relating to property rights which would clearly be outside the Commission's authority and jurisdiction. Instead, the complaint alleges that the proximity of the poles and lines to her building is creating unsafe conditions at the building and the condition and height of the lines is creating an unsafe condition in a nearby intersection. The framing of this complaint by Verizon solely as a property rights dispute is clearly misplaced.

The Commission has jurisdiction to ensure that every public utility furnishes and maintains adequate, efficient, safe and reasonable service and facilities, and makes all such repairs, changes, alterations, substitutions, extensions and improvements in or to such service and facilities as shall be necessary for the accommodation, convenience and safety of its patrons, employees and the public. 66 Pa.C.S. § 1501. Furthermore, the term "facilities" is defined in the Public Utility Code as "all the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with, the business of any public utility." 66 Pa.C.S. § 102. The pole and wires that the Complainant references are certainly part of utility facilities.

As such, when viewed in the light most favorable to the Complainant, the averments regarding the proximity of poles and wires and the allegation that unsafe conditions

exist to people and property are issues beyond the scope and validity of the right-of-way and one over which the Commission has jurisdiction in order to determine, for example, if Section 1501 has been violated. *See e.g., Rebecca Mueller v. PECO Energy Company*, Docket No. C-2008-2028862 (Opinion and Order entered Nov. 23, 2010); *Jeremy Kashuba v. PECO Energy Company*, Docket No. C-2012-2333019 (Opinion and Order entered Dec. 5, 2013). The preliminary objection raised by Verizon asserting that the Commission is without subject matter jurisdiction over the complaint is, therefore, denied.

It is the policy of the Commission to encourage settlements. 52 Pa.Code § 5.231. In addition, it is Commission policy to encourage mediation during which the parties may attempt to resolve the case with the aid of a mediator. 52 Pa.Code §§ 69.391– 69.397. The mediator, a neutral staff member within the Mediation Unit of the Commission’s Office of Administrative Law Judge, does not give advice, represent any party, evaluate or make a decision. Instead, the mediator assists the parties in their efforts to come to an agreement thereby avoiding the time, expense and uncertainty of litigation. The Respondent in its answer and new matter requested that the parties have the opportunity to resolve the complaint through mediation. In the event the parties are unable to resolve this matter with the assistance of the mediator, a formal hearing will be scheduled


ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. That the preliminary objection filed by Verizon Pennsylvania, LLC at Docket Number C-2016-2559745, relating to subject matter jurisdiction is denied.
2. That the formal complaint in this matter is hereby referred to the Commission’s Mediation Unit for the Commission’s mediation review process.

Date: _____

1/11/17



Benjamin J. Myers
Administrative Law Judge

C-2016-2559745 - PAULA PONTE v. VERIZON PENNSYLVANIA LLC

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