

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Bruce D. Heffner	:	
	:	
v.	:	C-2016-2547516
	:	
PPL Electric Utilities Corporation	:	

INITIAL DECISION

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

A property owner filed a complaint against an electric utility alleging that the utility was acting unreasonably by removing vegetation located in its right of way adjacent to the owner's property. This decision denies the complaint because the utility acted in accordance with applicable regulations by removing the vegetation on its right of way.

HISTORY OF THE PROCEEDING

On May 9, 2016, Bruce D. Heffner (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against PPL Electric Utilities Corporation (Respondent). The complaint asserts that the Respondent has removed vegetation on its right of way adjacent to the Complainant's property.

According to the complaint, the vegetation removal changed the direction of the water flowing across the right of way and directed the water runoff onto the Complainant's property. The complaint states that the water runoff damaged the Complainant's residence. The

complaint requests that the Commission direct the Respondent to correct the water runoff flow caused by its vegetation removal.

On June 15, 2016, the Respondent filed an answer. The answer alleges that the Respondent's employees completed an analysis of the water runoff on the Complainant's property. The Respondent's employees concluded that the water runoff problem originates from ground water, not from the vegetation removal performed by the Respondent. In addition, the answer points out that storm water runoff from an adjacent development at a higher elevation contributes to increased water runoff on the Complainant's property. The answer requests that the Commission deny the complaint.

By notice dated September 28, 2016, the Commission scheduled an initial telephonic hearing for this matter on October 31, 2016 at 10:00 a.m. I issued a prehearing order dated September 30, 2016, addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

On October 25, 2016, the Respondent filed a motion for continuance. In support of its motion, the Respondent alleged that one of its witnesses had been hospitalized and was confined to his home. The motion stated that the witness was going to testify about his investigation of the water problem on the Complainant's property and his interactions with the Complainant. Since the witness was unavailable to participate in the October 31, 2016 hearing due to his medical condition, the Respondent requested that the hearing be continued. The motion indicated that the Respondent had informed Complainant of its request and the Complainant did not object to the continuance.

I granted the request for continuance and by notice dated October 25, 2016, the Commission scheduled an initial telephonic hearing for this matter on December 5, 2016 at 10:00 a.m.

I conducted the initial telephonic hearing as scheduled on December 5, 2016. The Complainant appeared pro se, presented testimony and sponsored seven exhibits that I

admitted into the record. Kimberly G. Krupka, Esquire represented the Respondent, which presented two witnesses who sponsored three exhibits that I admitted into the record. The hearing resulted in a transcript of 113 pages. The record closed on December 29, 2016, the date the transcript was filed with the Secretary's Bureau. For the reasons set forth below, I will deny the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Bruce D. Heffner. N.T. 6.
2. The Respondent in this case is PPL Electric Utilities Corporation. N.T. 7.
3. The Complainant received a notice from Penn Line Service, Inc. (Penn Line), dated June 11, 2015. N. T. 10-11, Complainant's Ex. 1.
4. Penn Line was under contract to the Respondent to perform vegetation control work on the Respondent's right of way adjacent to the Complainant's property. N. T. 10-12, Complainant's Ex. 1.
5. The notice detailed the various methods of vegetation control that Penn Line would use. N. T. 10-12, Complainant's Ex. 1.
6. The notice stated that the vegetation control work would take place in the next 2-4 weeks. N. T. 10-12, Complainant's Ex. 1.
7. On or about June 29, 2015, water seeped into the basement of the Complainant's residence.
8. The water damaged the Complainant's basement wall, causing a portion of it to collapse. N.T. 7-9, 14-15.

9. The water damaged the drywall and flooring in the Complainant's basement recreation room. N.T. 7-9, 14-15.
10. The Complainant filed a claim with his home owner's insurance carrier. N.T. 15-16, Complainant's Ex. 3.
11. The insurance carrier sent an engineer to the Complainant's residence to investigate and evaluate the damage to the Complainant's residence. N.T. 15-16, Complainant's Ex. 3.
12. The engineer visited the Complainant's residence on July 7, 2015. N.T. 15-16, Complainant's Ex. 3.
13. By letter dated July 8, 2015, the engineer informed the insurance carrier of the results of his investigation and evaluation. N.T. 15-16, Complainant's Ex. 3.
14. The letter confirms that the basement of the Complainant's residence suffered water damage. N.T. 15-16, Complainant's Ex. 3.
15. The letter indicated that surface or ground water seepage through the basement wall caused the damage. N.T. 15-16, Complainant's Ex. 3.
16. Subsequently, by letter dated July 14, 2015, the Complainant's insurance carrier informed the Complainant that, based on the engineer's July 8, 2015 report, it was denying coverage of the Complainant's claim. N.T. 16, Complainant's Ex. 4.
17. The Complainant paid a contractor to perform repairs to the basement walls of his residence and install a sump pump. N.T. 19-20, Complainant's Ex. 6.
18. The Complainant purchased flooring to replace the basement recreation flooring damaged by water seepage. N.T. 19-20, Complainant's Ex. 6.

19. After he discovered the water seepage in the basement of his residence, the Complainant contacted the Respondent. N.T. 26-28.

20. The Respondent sent several employees to his property. N.T. 26-28.

21. The Respondent's employees investigated his claims that the vegetation control performed by Penn Line had caused excessive water runoff that damaged the basement of his residence. N.T. 26-28.

22. The Respondent's employees indicated to the Complainant that the vegetation control did not cause the damage. N.T. 26-28.

23. There is a swale or drainage area next to the Complainant's property. N.T. 30-31.

24. The swale directs water into a drain that carries the water to the street. N.T. 31-32, PPL Ex. 10-40.

25. The drainage swale is located on property owned by Ridge Terrace, an apartment complex located next to the Complainant's property. N.T. 33.

26. Ridge Terrace had stopped mowing a portion of its property located next to the swale. N.T. 33-34.

27. Five or six years ago, a new housing development was constructed along Marlin Road. N.T. 35-36.

28. Marlin Road runs parallel to the Respondent's right of way. N.T. 36.

29. The new development consists of approximately eight houses. N.T. 36.

30. The new development is located on a higher elevation than the Respondent's right of way. N.T. 37.
31. The Complainant contacted Norwegian Township, where he resides concerning water runoff from the new housing development. N.T. 37-38.
32. During the summer of 2016, Norwegian Township installed a new drainage system on Marlin Road. N.T. 38, 40-41.
33. The right of way adjacent to the Complainant's property contains two 69 kV regional transmission lines. N.T. 58.
34. The Respondent's maintenance schedule requires that vegetation control be performed on rights of way containing transmission lines with this voltage every three to four years. N.T. 59.
35. The Respondent's vegetation control plan requires removing brush growing underneath the transmission lines. N.T. 59.
36. In the wooded area adjacent to the right of way the vegetation control plan requires targeting and removing any dead or hazardous trees. N.T. 59.
37. When the Respondent's contractor performed vegetation removal on the right of way, it did not destroy the ground cover but tried to maintain it. N.T. 60.
38. The contractor applied herbicides but only on species that could grow tall enough to interfere with the transmission lines. N.T. 60.
39. The contractor mowed the remaining vegetation. N.T. 60.
40. There were no signs of erosion on the Respondent's right of way. N.T. 61.

41. Water flows from a development onto the Respondent's right of way at an elevation above that of the Complainant's property. N.T. 71-72, PPL Ex. 4.

42. The Complainant's property consists of Atkins silt loam soil and Weikert and Klineville shaly silt loam. N.T. 97-98, PPL Ex. 11.

43. These soil types are not very favorable toward construction of dwellings with basements. N.T. 99-100.

DISCUSSION

Before addressing the merits of the Complainant's complaint, I will first address the Complainant's apparent request that the Commission award him monetary damages. The Complainant's complaint does not directly request that the Commission award him monetary damages but does indicate that the Complainant incurred approximately \$15,000.00 in water damage to his residence. In addition, at the hearing, the Complainant provided copies of paid invoices for work performed to his home. Complainant's Ex. 6. To the extent that the Complainant is requesting reimbursement from the Respondent for costs he has incurred repairing the water damage to his residence, the Commission lacks the authority to award monetary damages in this case.

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.Cmwlt. 1995).

Even if the facts alleged in the Complainant's complaint were proven to be true, the Commission could not award monetary damages to the Complainant. The Complainant's request that the Respondent reimburse him for his repair costs is a request for monetary damages and is beyond the authority the General Assembly has granted to the Commission. Therefore, the Complainant's apparent request that the Commission award him monetary damages is denied.

The Complainant indicates that the Respondent is responsible for the damage to the Complainant's residence. To the extent that the Complainant is requesting that the Commission determine that the Respondent was negligent in removing vegetation from its right of way, 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 to make determinations of negligence and 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).

The facts alleged in the Complainants' complaint, if proven true, could constitute unreasonable service in violation of the Public Utility Code or Commission regulations. The Commission has jurisdiction over service disputes between public utilities operating in Pennsylvania and their customers. 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.Cmwlt. 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 constitute unreasonable service pursuant to 66 Pa.Code § 1501, a civil penalty, payable to the Commonwealth of Pennsylvania, may be appropriate, pursuant to 66 Pa.C.S. §3301.

Turning to the merits of the Complainant's complaint, the Complainant in this proceeding has the burden of proof to show that the Respondent is responsible or accountable for the problem described in the complaint. Patterson v. Bell Telephone Co. of Pennsylvania, 72 Pa. PUC 196 (1990), Feinstein v. Philadelphia Suburban Water Co., 50 Pa. PUC 300 (1976). The

Complainant must establish his case by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n., 578 A.2d 600 (Pa. Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992). To meet his burden of proof, the Complainant must present evidence more convincing, by even the smallest amount, than that presented by the Respondent. Se-Ling Hosiery v. Margulies, 70 A.2d 854 (Pa. 1950).

In this case, the Complainant contends that the Respondent provided unreasonable service by removing vegetation from its right of way adjacent to his property. The vegetation removal changed the direction of the water runoff flowing across the right of way and directed the water runoff onto the Complainant's property. The water runoff damaged the Complainant's residence. I will address the Complainant's contentions after providing some background information taken from the evidence presented by the Complainant and Respondent.

The Complainant testified that he received a notice from Penn Line, dated June 11, 2015. N. T. 10-11, Complainant's Ex. 1. The notice indicated that Penn Line was under contract to the Respondent to perform vegetation control work on the Respondent's right of way adjacent to the Complainant's property. N. T. 10-12, Complainant's Ex. 1. The notice detailed the various methods of vegetation control that Penn Line would use. N. T. 10-12, Complainant's Ex. 1. The notice stated that the vegetation control work would take place in the next 2-4 weeks. N. T. 10-12, Complainant's Ex. 1.

The Complainant provided a photograph of the Respondent's right of way depicting its appearance before Penn Line performed the vegetation control work. N.T. 12-14, Complainant's Ex. 2. The Complainant provided photographs of the Respondent's right of way depicting its appearance after Penn Line performed the vegetation control work. N.T. 16-18, Complainant's Ex. 5.

After Penn Line performed the vegetation control work, the Complainant testified there was a two day rain storm in the area where the Complainant resides. N.T. 7-9, 14-15. After the rain storm, on or about June 29, 2015, water seeped into the basement of the Complainant's residence. The water damaged the Complainant's basement wall, causing a

portion of it to collapse. N.T. 7-9, 14-15. In addition, the water damaged the drywall and flooring in the Complainant's basement recreation room. N.T. 7-9, 14-15.

As a result of this damage, the Complainant filed a claim with his home owner's insurance carrier. N.T. 15-16, Complainant's Ex. 3. The insurance carrier sent an engineer to the Complainant's residence to investigate and evaluate the damage to the Complainant's residence. N.T. 15-16, Complainant's Ex. 3. The engineer visited the Complainant's residence on July 7, 2015. N.T. 15-16, Complainant's Ex. 3.

By letter dated July 8, 2015, the engineer informed the insurance carrier of the results of his investigation and evaluation. N.T. 15-16, Complainant's Ex. 3. The letter confirms that the basement of the Complainant's residence suffered water damage. N.T. 15-16, Complainant's Ex. 3. The letter indicated that surface or ground water seepage through the basement wall caused the damage. N.T. 15-16, Complainant's Ex. 3.

Subsequently, by letter dated July 14, 2015, the Complainant's insurance carrier informed the Complainant that, based on the engineer's July 8, 2015 report, it was denying coverage of the Complainant's claim. N.T. 16, Complainant's Ex. 4.

The Complainant provided copies of paid invoices. N.T. 19-20, Complainant's Ex. 6. These invoices indicate that the Complainant paid a contractor to perform repairs to the basement walls of his residence and install a sump pump. N.T. 19-20, Complainant's Ex. 6. In addition, the invoices show that the Complainant purchased flooring to replace the basement recreation flooring damaged by water seepage. N.T. 19-20, Complainant's Ex. 6.

The Complainant provided a video showing the Complainant's property on August 12, 2015 and two other videos showing the Complainant's property after a heavy rain event that occurred on October 29, 2015. N.T. 21-22, Complainant's Ex. 7.

The Complainant testified that, after he discovered the water seepage in the basement of his residence, he contacted the Respondent. N.T. 26-28. The Respondent sent

several employees to his property. N.T. 26-28. The employees investigated his claims that the vegetation control performed by Penn Line had caused excessive water runoff that damaged the basement of his residence. N.T. 26-28. According to the Complainant, the Respondent's employees indicated that the vegetation control did not cause the damage. N.T. 26-28.

The Complainant also asserted that 4-5 years ago the Respondent's contractor had performed vegetation control on the right of way and had altered the slope of the right of way. N.T. 8-9, 11, 18-19, 23-24. The Complainant contended that the alteration of the slope redirected water runoff onto his property. N.T. 8-9, 11, 18-19, 23.

On cross examination, the Complainant indicated that there was a swale or drainage area next to his property. N.T. 30-31. The swale directs water into a drain that carries the water to the street. N.T. 31-32, PPL Ex. 10-40. The drainage swale is located on property owned by Ridge Terrace, an apartment complex located next to the Complainant's property. N.T. 33. The Complainant indicated that Ridge Terrace had stopped mowing a portion of its property located next to the swale. N.T. 33-34.

On cross examination, the Complainant testified that five or six years ago, a new housing development was constructed along Marlin Road. N.T. 35-36. Marlin Road runs parallel to the Respondent's right of way. N.T. 36. The new development consists of approximately eight houses. N.T. 36. The new development is located on a higher elevation than the Respondent's right of way. N.T. 37.

The Complainant stated that he had contacted Norwegian Township, where he resides concerning water runoff from the new housing development. N.T. 37-38, As a result of his contact with Norwegian Township, during the summer of 2016, it installed a new drainage system on Marlin Road. N.T. 38, 40-41.

The Complainant reiterated his claim that the Respondent had altered its right of way approximately five years ago and altered the flow of water runoff across the right of way.

N.T. 41. He also explained that the property where the Respondent's right of way was located was owned by the Ridge Terrace apartment complex. N.T. 41-42.

The Complainant conceded that during the period of 2011-2015, he did not discover any water in the basement of his residence. N.T. 42. However, he asserted that there was water in his back yard during that time period. N.T. 42-43.

Also on cross examination, the Complainant clarified that the photograph marked as Complainant's Ex. 2 was taken on July 13, 2015, after he discovered water in his basement but before the Respondent's contractor performed the vegetation removal on the Respondent's right of way. N.T. 43. He further clarified that the photograph marked as Complainant's Ex. 5 was taken on August 12, 2015, after the Respondent's contractor performed the vegetation removal on the Respondent's right of way. N.T. 44. Therefore, the Complainant conceded that the Respondent's contractor performed the vegetation removal between July 13, 2015 and August 12, 2015 or after he discovered water in his basement. N.T. 44.

The Respondent presented the testimony of Eric Moncavage. N.T. 50-51. Mr. Moncavage is a line clearance inspector. N.T. 50. Mr. Moncavage stated that he visited the Complainant's property four times and went into the Complainant's residence two of the four times. N.T. 52-54.

Mr. Moncavage testified that the right of way adjacent to the Complainant's property contains two 69 kV regional transmission lines. N.T. 58. The Respondent's maintenance schedule requires that vegetation control be performed on rights of way containing transmission lines with this voltage every three to four years. N.T. 59. The Respondent's vegetation control plan requires removing brush growing underneath the transmission lines. In the wooded area adjacent to the right of way the vegetation control plan requires targeting and removing any dead or hazardous trees. N.T. 59.

Mr. Moncavage testified that when the Respondent's contractor performed vegetation removal on the right of way, it did not destroy the ground cover but try to maintain it.

N.T. 60. He acknowledged that the contractor applied herbicides but only on species that could grow tall enough to interfere with the transmission lines. N.T. 60. The contractor mowed the remaining vegetation. N.T. 60.

He also observed that there were no signs of erosion on the Respondent's right of way. N.T. 61. According to Mr. Moncavage, if there were erosion occurring in the right of way there would be a pathway created by the water visible in the right of way and debris carried by the running water. N.T. 61-62. Neither of these conditions exist in the right of way. N.T. 61-63.

Mr. Moncavage testified that he also visited the new housing development located at an elevation above the Respondent's right of way. N.T. 70, PPL Ex. 10-45. Mr. Moncavage followed a pathway created by water runoff from that development. N.T. 70-71. The water flows from that development onto the Respondent's right of way at an elevation above that of the Complainant's property. N.T. 71-72. Mr. Moncavage provided an aerial photograph showing the flow of water from this development. N.T. 72-73, PPL Ex. 4.

Mr. Moncavage indicated that based on his observations, the vegetation control performed by Penn Line did not cause the Complainant's water problem and re-grading the Respondent's right of way would not alleviate the Complainant's water problem. N.T. 73-74. Re-grading the right of way could cause erosion and sedimentation problems. N.T. 73-74.

Mr. Moncavage indicated that the water runoff from housing development may be contributing to the Complainant's water problems. N.T. 75. The water from the housing development is flowing into the drainage swale located next to the Complainant's property. N.T. 75

The Respondent also presented the testimony of James Clauser, an environmental professional. N.T. 93. Mr. Clauser visited the Complainant's property during the summer of 2015 three times. N.T. 94.

Mr. Clauser provided a copy of a United States Department of Agriculture (USDA) soil survey. N.T. 97, PPL Ex. 8. The soil survey indicates that the Complainant's property consists of Atkins silt loam soil and Weikert and Klineville shaly silt loam. N.T. 97-98, PPL Ex. 11. The soil survey indicates that these soil types are not very favorable toward construction of dwellings with basements. N.T. 99-100.

According to Mr. Clauser, because of the limitations of these soil types it is likely that the Complainant's water problems are the result of ground water, not water runoff. N.T. 100-101. He also observed that the Respondent's right of way adjacent to the Complainant's property was approximately one acre in size. N.T. 103. Mr. Clause indicated that water runoff from this size of right of way would not produce the amount of water in his basement experienced by the Complainant. N.T. 103-104.

Having provided a brief summary of the evidence presented by the Complainant and the Respondent, I will now address the Complainant's claim that the Respondent has provided unreasonable service by performing vegetation removal which changed the direction of the water flowing across the right of way and directed the water runoff onto the Complainant's property. I will start by observing that the Commission's jurisdiction over vegetation management and utility rights of way has limitations.

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 (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).

To the extent that the Complainant contends that the terms of the Respondent's easements obligate the Respondent to reimburse him for damage to his property, he must pursue those claims in another forum. 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). In Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission does not have jurisdiction to determine the scope and validity of an easement.

While the Commission does not have jurisdiction to adjudicate real property disputes, the Commission does have jurisdiction over service disputes between public utilities operating in Pennsylvania and their customers. The statute at 66 Pa.C.S. § 1501 governs any allegations of unreasonable or inadequate service. Pursuant to 66 Pa.C.S. § 1501, the Commission has original jurisdiction over the reasonableness and adequacy of public utility service. Elkin v. Bell Telephone Co., 372 A.2d 1203 (Pa.Super. 1977) aff'd 420 A.2d 371 (Pa. 1977); Behrend v. Bell Telephone Co., 243 A.2d 346 (Pa. 1968) As a general proposition, neither the Public Utility Code nor the Commission's regulations require public utilities to provide constantly flawless service. The Public Utility Code at 66 Pa.C.S. § 1501 requires public utilities to provide reasonable and adequate, not perfect service. The statute at 66 Pa.C.S. § 1501 provides in part:

§ 1501 Character of service and facilities

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public...

The definition of service is broad. The definition of service at 66 Pa.C.S. § 102 states in part as follows:

“Service.” Used in its broadest and most inclusive sense, includes any and all acts done, rendered or performed, and any and all things furnished or supplied, and any and all facilities used, furnished or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to their patrons, employees, other public utilities, and the public...

If the subject matter of the complaint does not fall within the definitions of service or facilities as set forth above, the complaint is a private dispute and not within the Commission’s jurisdiction. Rovin v. Pa. Pub. Util. Comm’n., 502 A.2d 785 (Pa.Cmwlt. 1986)(water fluoridation practices of a public utility are not within the Commission’s jurisdiction); see also, Country Place Waste Treatment Co. v. Pa. Pub. Util. Comm’n., 654 A.2d 72 (Pa.Cmwlt. 1995)(control of odors emanating from a sewage treatment plant operated by a public utility not within the Commission’s jurisdiction); West Penn Power Co. v. Pa. Pub. Util. Comm’n., 578 A.2d 75 (Pa.Cmwlt. 1990)(“the definition of ‘service’ is sufficiently broad enough to encompass a utility’s vegetation clearance practices in its right-of-ways.”). Therefore, the Commission does have jurisdiction to determine whether the Respondent’s vegetation control practices in this case constitute unreasonable service.

The Commission has developed regulations governing vegetation clearance or management as part of its inspection and maintenance standards for electric utilities. In developing its inspection and maintenance standards for electric utilities at 52 Pa.Code § 57.198, the Commission addressed vegetation management. These regulations at 52 Pa.Code § 57.198 require an electric utility to submit a plan every two years for the periodic inspection, maintenance, repair and replacement of its facilities. The regulation at 52 Pa.Code § 57.198(f) requires the plan to include a program for the maintenance of clearances of vegetation from the electric utilities’ overhead distribution facilities.

The Commission did not promulgate regulations regarding transmission lines such as those that cross the Complainant’s property. In the order promulgating the inspection and maintenance standards at 52 Pa.Code § 57.198, the Commission declined to adopt mandatory vegetation management standards for transmission lines but determined to monitor development of vegetation management standards for transmission lines by the North American

Electric Reliability Corporation (NERC) and the Federal Energy Regulatory Commission (FERC). Lehet v. PPL Electric Utilities Corporation, Docket No. C-2014-2449983 (Opinion and Order entered October 28, 2015); Inspection and Maintenance Standards for Electric Distribution Companies, 38 Pa.B. 5273. (September 27, 2008).

Deferring to NERC and FERC with regard to vegetation management is consistent with the federal statute at 16 U.S.C. § 824o(i)(3) governing electric reliability. That statute provides that states may take action to ensure the safety, adequacy and reliability of electric service within that state as long as such action is not inconsistent with federal reliability standards. The purpose of the Commission's regulations at 52 Pa.Code § 57.198, as well as the NERC and FERC standards, is to require electric utilities, like the Respondent, to take proactive measures to minimize service interruptions.

The Complainant failed to present any evidence that the application of the NERC FERC standards in this case is unreasonable. In addition, the Complainant failed to present any evidence that the Respondent did not comply with NERC and FERC vegetation management standards.

The Respondent presented testimony concerning the vegetation control methods that its contractors use in order to improve reliability while minimizing erosion. The Complainant did not offer any testimony suggesting that the methods used by the Respondent and its contractors were unreasonable.

Rather than presenting evidence concerning whether the Respondent complied with the applicable vegetation management standards using reasonable methods, the Complainant presented evidence of the water damage to his residence. As stated above, the Commission has no authority to award monetary damages to the Complainant.

The Complainant put forth the theory that the Respondent's vegetation management practices caused the water damage to his residence. The Complainant contends that 4-5 years ago the Respondent's contractor performed vegetation control on the right of way and

altered the slope of the right of way. To the extent that the Complainant is requesting that the Commission find that the Respondent or its contractor negligently performed vegetation removal in its right of way, as stated above, the Commission has no authority to determine whether the Respondent or its contractor negligently performed the vegetation removal.

Furthermore, the Complainant's claim that the vegetation removal work performed 4-5 years ago by the Respondent or its contractor caused damage to the Complainant's residence, is barred by statute of limitations set forth at 66 Pa.C.S. § 3314. The Respondent has not raised the statute of limitations set forth at 66 Pa.C.S. § 3314 in its pleadings. However, as discussed below, the statute of limitations at 66 Pa.C.S. § 3314 divests the Commission of jurisdiction and therefore must be addressed. For the reasons set forth below, I conclude that the statute of limitations at 66 Pa.C.S. § 3314 is applicable to this claim in the Complainant's complaint.

The Respondent did not raise the statute of limitations in either its preliminary objections or in new matter in its answer. However, the Commission has previously determined that the statute of limitations at 66 Pa.C.S. § 3314 may be raised through preliminary objections, pursuant to 52 Pa.Code § 5.101(a)(1). Speeler v. Peoples Natural Gas Company, LLC, Docket No. C-2016-2526110 (Final Order entered April 18, 2016). Commission preliminary objections, pursuant to 52 Pa.Code § 5.101, are analogous to preliminary objections pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure in civil practice. Pennsylvania appellate courts have determined that some statutes of limitations may be raised through preliminary objections, pursuant to Pa. R.C.P. 1028.

Pennsylvania appellate courts have set forth very clear standards as to when the statute of limitations may be raised by preliminary objections, pursuant to Pa. R.C.P. 1028. If the statute of limitations is a non-waivable defense, it may be raised as a preliminary objection pursuant to Pa. R.C.P. 1028. However, if the statute of limitations is waivable, it must be raised by new matter in a responsive pleading. Reuben v. O'Brien, 445 A.2d 801 (Pa. Super 1982) (Reuben). A statute of limitations is non-waivable if the time limitation contained in it terminates not just the remedy but the actual right to bring the action. A statute of limitations is

waivable if the time limitation contained in it terminates just the remedy but not the right to bring the action. Reuben

The statute of limitations at 66 Pa.C.S. § 3314 is non-waivable. The statute at 66 Pa.C.S. § 3314 provides that no action for recovery of penalties or forfeitures, or any prosecution may be maintained unless brought within three years from the date the liability arose. This is a non-waivable statute of limitations since it terminates the right to bring an action as well as any remedy. The statute of limitations at 66 Pa.C.S. § 3314 divests the Commission of jurisdiction to hear an action brought more than three years from the date the liability arose and is properly raised through preliminary objections, pursuant to 52 Pa.Code § 5.101(a)(1). Since the statute of limitations at 66 Pa.C.S. § 3314 is non-waivable and divests the Commission of jurisdiction, it may be raised at any time.

Applying the three year statute of limitations at 66 Pa.C.S. §3314 to this case, the Complainant filed his complaint on May 6, 2016. I will, therefore, bar any claims by the Complainants for events that occurred prior to May 6, 2013. The Complainant testified that the Respondent allegedly altered the slope of the right of way 4 or 5 years ago or during the 2011-2012 time period. These alleged events occurred prior to May 6, 2013 and claims concerning these events are barred.

Based on the above discussion, I conclude that the Complainant has failed to establish by a preponderance of the evidence that the Respondent's vegetation removal in its transmission line right of way adjacent to the Complainant's property constituted unreasonable service to the Complainant. The Commission's regulations governing vegetation management have deferred to NERC vegetation management standards for transmission lines and there is no evidence either that the Respondent failed to comply with the NERC standards by removing the vegetation in the right of way adjacent to the Complainant's property or that it used unreasonable methods in complying with those standards. Since the Complainant has failed to establish the allegations set forth in his complaint, I will deny the complaint and enter the following order.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and parties to this proceeding. 66 Pa.C.S. § 701.
2. The burden of proof in this proceeding is on the Complainant. 66 Pa.C.S. § 332(a).
3. The Commission lacks authority to award damages. Terminato v. Pa. National Insurance Co., 645 A.2d 1287 (Pa. 1994).
4. The Commission lacks jurisdiction to resolve property rights controversies. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Opinion and Order entered July 3, 2003).
5. The Commission has original jurisdiction over the reasonableness and adequacy of public utility service. 66 Pa.C.S. § 1501, Elkin v. Bell Telephone Co., 372 A.2d 1203 (Pa.Super. 1977) aff'd, 420 A.2d 371 (Pa. 1977).
6. Public utilities must provide reasonable and adequate service. 66 Pa.C.S. § 1501.
7. An electric utility must submit a plan every two years for the periodic inspection, maintenance, repair and replacement of its facilities, including a program for the maintenance of clearances of vegetation from the electric utilities' overhead distribution facilities. 52 Pa.Code § 57.198.
8. The Commission has declined to adopt mandatory vegetation management standards for transmission lines but has deferred to NERC and FERC regarding development of vegetation management standards for transmission lines. Inspection and Maintenance Standards for Electric Distribution Companies, 38 Pa.B. 5273. (September 27, 2008).

9. The Complainant has not met his burden of proving that he is entitled to relief. 66 Pa.C.S. § 332(a)

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint filed by Bruce D. Heffner against PPL Electric Utilities Corporation at Docket No. C-2016-2547516 is denied.

2. That the case at Docket No. C-2016-2547516 is marked closed.

Date: January 17, 2017

_____/s/
David A. Salapa
Administrative Law Judge