

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Andrew Tomko	:	
	:	
v.	:	C-2016-2577571
	:	
Duquesne Light Company	:	

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

Before
Andrew M. Calvelli
Administrative Law Judge

INTRODUCTION

A utility customer filed a Complaint on behalf of “Residents of Willow Village Plan” and on behalf of Plum Borough located in Allegheny County Pennsylvania. In the Complaint, the Complainant asserts that he represents “The 35 Residents of The Willow Village Plan” and that he represents the interests of “Plum Boro”.¹ This decision dismisses the Complaint for lack of standing because the Complainant is not the customer who is directly affected by the challenged actions of the utility. The Complaint is also dismissed because the Complainant lacks the legal authority to bring the Complaint on behalf of either the Residents of The Willow Village Plan or Plum Borough, as the Complainant is not an attorney at law licensed to practice law in the Commonwealth of Pennsylvania.

¹ The Complainant uses the term “Plum Boro” while the Respondent Duquesne Light Company uses the term “Plum Borough.” I will refer to the municipality as Plum Borough in this Decision, except when quoting passages from the Complaint.

HISTORY OF THE PROCEEDING

On November 16, 2016, Andrew Tomko (Complainant or Mr. Tomko) filed a Complaint with the Pennsylvania Public Utility Commission (Commission) against Duquesne Light Company (Duquesne) on behalf of Residents of Willow Village Plan (herein “Willow Village”) and Plum Borough. In the Complaint, Mr. Tomko requests, on behalf of Willow Village and Plum Borough, that Duquesne install an Underground Residential Development (“URD”) street light on Willow Village Drive near Saltsburg Road. Mr. Tomko further states that Duquesne’s refusal to install a street light on Willow Village Drive is not acceptable as far as Willow Village and Plum Borough are concerned. Mr. Tomko also asserts that Plum Borough will fully reimburse Duquesne Light for their expenditures for the installation of the URD street light. The Complaint was served on Duquesne electronically by the Commission’s Secretary on November 29, 2016.²

On December 20, 2016, Duquesne filed an Answer with New Matter to the Complaint, along with Preliminary Objections to the Complaint.³ In the Answer with New Matter, Duquesne admitted only that Mr. Tomko was the ratepayer for the service address listed on the Complaint. Duquesne denied the other allegations, and also asserted that the Complaint should be dismissed because Mr. Tomko lacked standing to bring the claims mentioned in the Complaint.

In the Preliminary Objections, Duquesne asserted three grounds for objecting to the Complaint - 1) that Mr. Tomko lacked standing to pursue claims on behalf of Willow Village and Plum Borough; 2) that Mr. Tomko was precluded from pursuing claims on behalf of Willow Village and Plum Borough because he was not an attorney at law licensed to represent others in

² Duquesne has signed a waiver of the Section 702 requirements for service of formal complaints, 66 Pa.C.S. § 702, and has agreed to electronic service instead under the Commission’s Waiver of 702 program.

³ The cover letters to the Answer with New Matter and Preliminary Objections state that the documents were originally e-filed on December 19, 2016, the due date for those filings. The cover letters also state that two of the case docket numbers were transposed by Duquesne’s counsel, the error was noticed, and the matter was corrected on December 20, 2016. The presiding officer may disregard a defect of procedure that does not affect the substantive rights of the parties (52 Pa. Code §1.2(a)), and I conclude that the e-filings will be treated as timely filed under these circumstances.

proceedings before the Commission; and 3) that Mr. Tomko had failed to join Plum Borough as an indispensable party to this proceeding. Duquesne requested that the Complaint be dismissed as a result.

Responses to the New Matter and Preliminary Objections were due no later than January 12, 2017. Mr. Tomko did not respond to either the New Matter or Preliminary Objections.

By Motion Judge Assignment Notice issued on March 17, 2017, the parties were advised that the Preliminary Objections had been assigned to me for a ruling. The Preliminary Objections are now ripe for consideration. For the reasons discussed below, the Preliminary Objections will be sustained and the Complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant in this case is Andrew Tomko who resides at 100 Willow Village Drive, Pittsburgh PA 15239.
2. The Respondent in this case is Duquesne Light Company.
3. On November 16, 2016, the Complainant filed a Complaint with the Pennsylvania Public Utility Commission.
4. The Complaint was served on the Respondent by the Commission on November 29, 2016.
5. On December 20, 2016, the Respondent filed an Answer with New Matter to the Complaint, along with Preliminary Objections to the Complaint.
6. The Complainant's responses to the New Matter and Preliminary Objections were due no later than January 12, 2017.

7. The Complainant did not file a response to either the New Matter or the Preliminary Objections.

DISCUSSION

1) Legal standard

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.

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). 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 deducible 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. Cmwlth. 1988). The Commission must view the Complaint in this case in the light most favorable to the Complainant and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

The Commission Regulation at 52 Pa.Code § 5.21(a) states that a person may file a formal complaint claiming a 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.

2) The Complainant lacks standing to maintain the Complaint

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co., 75 Pa. PUC 598, 603 (1991). Generally, the Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); Landlord Service Bureau, Inc. v. Equitable Gas Co., 79 Pa. PUC 342 (1993); Re Equitable Gas Co., 76 Pa. PUC 23 (1992); (other citations omitted).

As discussed in the matter of Luke v. Columbia Gas of Pennsylvania, Docket No. C-2014-2425948 (July 18, 2014), the legal considerations as to whether a party had standing to maintain a complaint were explained as follows:

The Complainant's interest in the subject matter of the proceeding is direct if her interest is adversely affected by the actions challenged in the complaint, is immediate if there is a close causal nexus between her asserted injury and the actions challenged in the complaint and is substantial if she has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996); In re El Rancho Grande, Inc., 437 A.2d 1150 (Pa. 1981); William Penn Parking Garage, Inc.; Empire Coal Mining & Development, Inc. v. Department of Environmental Resources, 623 A.2d 897 (Pa. Cmwlth. 1993).

Luke v. Columbia Gas of Pennsylvania, Docket No. C-2014-2425948 (July 18, 2014). I will apply the above legal precedent to the various Preliminary Objections below.

In the Complaint, Mr. Tomko begins by stating that "Plum Boro has requested from Duquesne Light to install a URD street light on Willow Village Dr. at the intersection of Saltsburg Rd." Mr. Tomko further states "the Boro made the determination that this was a safety hazard and wants to install a URD street light on Willow Village Drive."

Regarding his relation to Willow Village, and the matters allegedly affecting Willow Village, Mr. Tomko states in the Complaint that:

"I am representing the 35 Residents of The Willow Village Plan in filing this Formal Complaint. I am a retired Duquesne Light employee and held the job of Director of Engineering. I am very familiar with Duquesne Light standards, engineering and construction practices."

"The Residents of The Willow Village Drive request Duquesne Light Co. install 120 volt service from the existing terminal pole on Saltsburg Road and trench about 20 feet and install the URD street light along Willow Village Drive."

“Duquesne Light has proposed an overhead street light on Saltsburg Road which will not light Willow Village Dr. and has refused to install a URD street light on Willow Village Drive.”

“Duquesne Light has given reasons for not installing the URD street light which are not totally true or good engineering practices.”

See Complaint at pages 2-3. Additionally, Mr. Tomko signed the “Verification and Signature” portion of the Complaint as follows:

“I, Andrew Tomko for Residents of Willow Village Plan, hereby state that the facts above set forth are true and correct . . .

See Complaint at page 6. Finally, it must be noted that in the “Legal Representation” portion of the Complaint, Mr. Tomko wrote “To Be Determined” - meaning there was no attorney of record at the time of the filing of the Complaint by Mr. Tomko.

Accepting the allegations in the Complaint as true for purposes of disposing of the Preliminary Objections, it is clear that Mr. Tomko purports to represent all 35 residents of Willow Village Drive, and that he is only one of the 35 residents who are allegedly affected by Duquesne’s actions. Accordingly, Mr. Tomko’s legal interest in this proceeding is the same as the other 34 residents of Willow Village Drive. Therefore Mr. Tomko does not have a discernible interest in this matter, other than the general interest of all citizens in seeking compliance with the law. Mr. Tomko also does not have a direct, immediate or substantial interest in this matter, as there are no allegations in the Complaint to indicate such an interest. As a result, Mr. Tomko lacks standing to bring the Complaint regarding the street light issues and the Preliminary Objection in that regard (listed as Preliminary Objection No. 2) is sustained and the Complaint will be dismissed on that basis.

3) The Complainant is not legally authorized to represent Willow Village or Plum Borough

The Commission's Regulations are quite clear that while an individual may represent himself, he must be a licensed attorney in order to represent the interests of other individuals or parties. *See*, 52 Pa. Code §§1.8, 1.21 and 1.22. *See also*, Luke ("The Commission's regulation at 52 Pa. Code §1.21(b) provides that in adversarial proceedings, a person shall be represented by an attorney except where an individual represents himself or herself").

Although Mr. Tomko's Verification to the Complaint states that he is purportedly representing only the Residents of Willow Village, when viewing the allegations in the Complaint it is clear that Mr. Tomko is also purporting to represent the legal interests of Plum Borough. The relevant allegations in the Complaint follow:

"Plum Boro has requested from Duquesne Light to install a URD street light on Willow Village Dr. at the intersection of Saltsburg Rd."

"The Boro made the determination that this was a safety hazard and wants to install a URD street light on Willow Village Drive."

"Plum Boro finds Duquesne Light's response unacceptable. Plum Boro and my council men had set up a meeting with Duquesne Light and myself by Duquesne Light refused to meet with the Boro and me together."

"Duquesne Light has given reasons for not installing the URD street light which are not totally true or good engineering practices."

"Plum Boro will fully reimburse Duquesne Light for their expenditures for the installation of the URD street light."

Accepting the allegations in the Complaint as true for purposes of disposing of the Preliminary Objections, it is clear that Mr. Tomko purports to represent the legal interests of both Willow Village and Plum Borough. Mr. Tomko has asserted that the Borough finds Duquesne's

actions to be unacceptable, that the Borough is insisting on the installation of the URD street light on Willow Village Drive, and that the Borough will fully reimburse Duquesne Light for the cost of installation of the URD street light. Although not specifically mentioned in the Complaint, Plum Borough would presumably also be responsible for any recurring electric use charges associated with the URD street light.

Mr. Tomko lacks the legal authority to represent the interests of either Willow Village or Plum Borough because the Complaint makes it clear that he is not an attorney at law licensed to practice law in the Commonwealth of Pennsylvania. The Commission's Regulations are quite clear that while an individual may represent himself, he must be a licensed attorney in order to represent the interests of other individuals or parties. *See*, 52 Pa. Code §§1.8, 1.21 and 1.22. *See also*, Luke ("The Commission's regulation at 52 Pa. Code §1.21(b) provides that in adversarial proceedings, a person shall be represented by an attorney except where an individual represents himself or herself"). For that reason, the Preliminary Objection listed as Preliminary Objection No. 3 is sustained and the Complaint will be dismissed on that basis.

I note that Preliminary Objection No. 3 was made pursuant to 52 Pa. Code §5.101(a)(2), which provides that "failure of a pleading to conform to this chapter" is a basis for dismissing a complaint. However, "this chapter" refers to Chapter 5 of 52 Pa. Code, while the attorney representation rules are contained in Chapter 1 of 52 Pa. Code. That being said, I see no reason to interpret the language of 52 Pa. Code §5.101(a)(2) so narrowly as to preclude dismissing the Complaint in this case. Clearly, a non-attorney cannot bring a complaint on behalf of others before the Commission. Therefore I sustain Preliminary Objection No. 3 and dismiss the Complaint on this basis.

Additionally, even if one were to conclude that Preliminary Objection No. 3 is not the appropriate legal basis for requesting dismissal of the Complaint because the Complainant is not an attorney, the Commission has the authority to treat the objection as a motion for judgment on the pleadings, pursuant to 52 Pa. Code §1.2(a) which provides "the Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties." In this case, the substantive rights of

Mr. Tomko are not affected, since he chose not to file an answer to the Preliminary Objections and since the legal standards for deciding preliminary objections and motions for judgment on the pleadings are substantially similar. Therefore, to the extent that Preliminary Objection No. 3 is better treated as a Motion for Judgment on the Pleadings, the disposition of the Motion follows below.

The Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Chapters 1, 3 and 5, provide for the filing of motions for judgment on the pleadings. Section 5.102 of the Commission's Rules provides in relevant part:

§ 5.102 Motions for summary judgment and judgment on the pleadings.

(a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

* * *

(d) *Decisions on Motions.*

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

52 Pa.Code § 5.102(a), (d)(1) and (d)(2). When disposing of a motion for judgment on the pleadings, the record must be examined in the light most favorable to the nonmoving party. First Mortgage Co. of Pennsylvania v. McCall, 313 Pa. Superior Ct. 54, 56, 459 A.2d 406, 408 (1983). To avoid the motion for judgment on the pleadings, the nonmoving party must set forth facts showing that there is a genuine issue for trial. Id. at 58-59.

As mentioned above, the pleadings make it clear that Mr. Tomko is not an attorney at law. Therefore, there is no genuine issue as to the material fact that Mr. Tomko lacks the legal authority to represent either Willow Village or Plum Borough in this proceeding. Accordingly, the Complaint is dismissed under the standards set forth for determining motions for judgment on the pleadings as well, to the extent that a ruling in this regard is necessary.

In this case, the Respondent is entitled to judgment as a matter of law because the Complainant lacks the legal standing to maintain the Complaint on his own behalf, and also lacks the legal authority to act on behalf of Willow Village or Plum Borough. Since I am ruling in favor of the Respondent on those issues, it is unnecessary for me to discuss the Respondent's remaining Preliminary Objection alleging the failure to join Plum Borough as an indispensable party to this proceeding (listed as Preliminary Objection No. 1). I will grant the Respondent's request to dismiss the Complaint due to the Complainant's lack of standing and legal authority to represent Willow Village and Plum Borough, and hereby dismiss the Complaint and enter an appropriate Order below.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa.C.S. § 701.

2. A person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

3. The Complainant does not have a discernible interest in this proceeding other than the general interest of all citizens in seeking compliance with the law. Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996).

4. The Commission's Regulations state that while an individual may represent himself, he must be a licensed attorney in order to represent the interests of other

individuals or parties. 52 Pa. Code §§1.8, 1.21 and 1.22; Luke v. Columbia Gas of Pennsylvania, Docket No. C-2014-2425948 (July 18, 2014) (“The Commission’s regulation at 52 Pa. Code §1.21(b) provides that in adversarial proceedings, a person shall be represented by an attorney except where an individual represents himself or herself”).

5. The Complainant lacks the legal authority to file a Complaint on behalf of Willow Village. 52 Pa. Code §§1.8, 1.21 and 1.22.

6. The Complainant lacks the legal authority to file a Complaint on behalf of Plum Borough. 52 Pa. Code §§1.8, 1.21 and 1.22.

7. It is just, reasonable and in the public interest for the complaint filed at Docket No. C-2016-2577571 to be dismissed.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed at Docket No. C-2016-2577571 by Duquesne Light Company are hereby sustained.

2. That the Complaint of Andrew Tomko at Docket No. C-2016-2577571 against Duquesne Light Company is dismissed.

3. That the docket at Docket No. C-2016-2577571 is marked closed.

Date: April 7, 2017

/s/
Andrew M. Calvelli
Administrative Law Judge