

PENNSYLVANIA PUBLIC UTILITY COMMISSION

KENNETH LAFIANDRA	:	Docket No.: C-2017-2599036
<i>Complainant,</i>	:	
	:	
vs.	:	
	:	
PECO ENERGY COMPANY	:	
<i>Respondent.</i>	:	

ORDER

AND NOW, this _____ day of May, 2017, upon review of the Respondent's Preliminary Objection to Complaint and Complainant LaFiandra's Reply in Opposition, it is hereby, ORDERED AND DECREED, Respondent PECO Preliminary Objection to Complaint is dismissed.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

KENNETH LAFIANDRA	:	Docket No.: C-2017-2599036
<i>Complainant,</i>	:	
	:	
vs.	:	
	:	
PECO ENERGY COMPANY	:	
<i>Respondent.</i>	:	

**COMPLAINANT’S REPLY IN OPPOSITION TO
RESPONDANT PECO ENERGY COMPANY
PRELIMINARY OBJECTION TO COMPLAINT**

Complainant Kenneth LaFiandra (hereinafter "Complainant"), hereby files his Reply in Opposition to Respondent PECO Energy Company’s (“Respondent PECO”) Preliminary Objection to the Complaint, and avers in support thereof as follows:

1. Admitted in part, denied in part. It is admitted that Exhibit 1 is part of the Complaint filed in this matter. It is denied it was served on April 21, 2017. The Complaint was electronically filed on April 16, 2017 and served electronically on Respondent PECO on April 17, 2017. *See* Complaint attached as Exhibit 1 of Respondent’s Preliminary Objection.

2. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322 its *initial determination of necessity for the proposed condemnation*. *See* Complaint attached as Exhibit 1 of Respondent’s Preliminary Objection.

3. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to

Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

4. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322 its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

5. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

6. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

7. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to

Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

8. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

9. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

10. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

11. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to

Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

12. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. See Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

13. Admitted.

14. Denied. 52 Pa. Code § 5.1019a)(4), as a written document speaks for itself.

15. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied.

16. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied.

17. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied.

18. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied.

19. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied.

20. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied.

21. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied.

22. Denied. It is denied that the Commission lacks subject matter jurisdiction over the issue in this dispute, the initial necessity of the condemnation. It is denied that this matter is a property taking matter. This dispute has not been plead as a taking dispute since, unlike all of the cases cited by the Respondent, this matter does not concern a claim for damages for any taking. *See* Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

23. Denied. The Complaint as a written document speaks for itself. By way of further reply, the Complaint is, *inter alia*, a request for the PUC to make, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 19333, P.L. 364, as amended 15 P.S. § 1322, its *initial determination of necessity for the proposed condemnation*. *See* Complaint attached as Exhibit 1 of Respondent's Preliminary Objection.

24. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

25. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

26. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

27. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

28. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

29. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

30. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

31. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

32. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, all such allegations are denied. By way of further reply, pursuant to Section 322 of the Business Corporation Law, Act of May 5, 1933, P.L. 364, *as amended*, 15 P.S. § 1322, the Commission has jurisdiction to make *an initial determination of necessity for the proposed condemnation*. See 15 P.S. § 1322(c).

33. Denied. The allegations of this paragraph constitute conclusions of law to which no response is required; however, to the extent such a response is deemed to be appropriate, Complaint requests that Respondent PECO's Preliminary Objections to the Complaint be dismissed.

WHEREFORE, Petitioner LaFiandra respectfully petitions this Honorable Court for requests that the Commission dismiss Respondent PECO's Preliminary Objection and hold its hearing on the necessity of the condemnation.

Date: 5.14.17

COMPLAINANT KENNETH LAFIANDRA,
ESQUIRE

By: */Kenneth LaFiandra/*
KENNETH J. LaFIANDRA
798 Woodlea Road
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vs.	:	
	:	
PECO ENERGY COMPANY	:	
<i>Respondent.</i>	:	

MEMORANUDM OF LAW
IN SUPPORT OF
COMPLAINANT’S REPLY IN OPPOSITION TO
PRELIMINARY OBJECTIONS TO COMPLAINT

Complainant Kenneth LaFiandra (hereinafter “Complainant”), hereby submits this Memorandum of Law in Support of his Reply in Opposition to Respondent PECO Energy Company’s (hereinafter “Respondent PECO”) Preliminary Objections to the Complaint.

I. Standard of Review.

“In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible Application of Rasier-PA, LLC, A-2014-2416127, citing, Dept. of Auditor General v. SERS, 836 A.2d 1053, 1064 (Pa.Cmwlt. 2003); P.J.S. v. Pa. State Ethics Comm’n, 669 A.2d 1105 (Pa.Cmwlt. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. Rasier-PA, citing, Boyd v Ward, 802 A.2d 705 (Pa. Cmwlt, 2002). All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. Ridge v. State Employees’ Retirement Board, 690 A.2d 1312 (Pa.Cmwlt. 1997). A preliminary objection which seeks dismissal of a pleading will only be granted where

relief is clearly warranted and free from doubt. Interstate Traveler Services, Inc. v. Pa. Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979); Application of K&F Medical Transport, LLC, PUC Docket No. A-2008-2020353. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it. Penllyn Greene Associates, L.P. v. Clouser, 890 A.2d 424, (Pa.Cmwlth.2005), *appeal denied*, 919 A.2d 960, 591 Pa. 719.

II. The Complaint Seeks To Have The PUC Make An Initial Determination of Necessity of Proposed Service Installation.

This matter concerns a determination of a public need for a proposed utility service installation. It is not a claim for a taking of land, as incorrectly declared by the Respondent in its Preliminary Objections. Such determinations of a public need are made by PUC, not the courts. In Re Sonoco Pipeline, 143 A.3d 1000, *citing*, Section 1103. “Section 1103 of the Code requires an applicant ... to establish that the proposed service is ‘necessary or proper for the service, accommodation, convenience, or safety of the public.’” *Supra* at 1017, *citing*, 66 Pa.C.S. § 1103(a). “Under this section, the applicant must “demonstrate a public need or demand for the proposed service....” *Supra* at 1017, *citing*, Chester Water Auth. v. Public Utility Comm'n, 581 Pa. 640, 868 A.2d 384, 386 (2005) (emphasis added). **In this matter, this Complainant wants the PUC to examine and determine if the proposed installation of the pole is necessary in light of the safer and more efficient alternatives.** Two alternatives to the installation of the utility pole in question are known to exist. This first was proposed by the Complainant. The second was proposed by the Respondent. Despite the existence of two alternative paths for the installation of the electric service, the Respondent refuses to examine the viability of the alternatives or explain why the alternatives have been summarily rejected. The

only provided explanation provided by PECO for its summary rejection of the alternatives is that the second alternative is more expensive in light of the need to cut down trees on the adjacent Roberts Road. A recent study by the local township engineer and tree consultant has revealed no expense to PECO for the removal of the trees in question, completely invalidating the only provided excuse of PECO for not utilizing the alternatives. (See Attachment A). No explanation was provided for the rejection of the first alternative. Since no claim for damages for the condemnation is being made in this matter, this matter concerns an issue fully within the exclusive jurisdiction of the PUC. In Re Sonoco Pipeline, *supra*, Chester Water Auth, *supra*. To the extent the *pro se* Complaint is unclear as to its request for relief, the Complainant asks that the Complaint be deemed as so amended to conform to the above or that the Complainant be given leave to file an amended complaint.

III. Conclusion.

In light of the above, the Respondent's Preliminary Objections are based on an incorrect description of the issue in dispute in this matter. This matter is filed to seek the expertise of the PUC in the resolution of the issue of the necessity and reasonableness of the proposed utility installation. Accordingly, the Respondent's Preliminary Objections based an assertion this matter is solely a damage case on a taking claim must be denied.

Date: 5/14/17

COMPLAINANT KENNETH LAFIANDRA,
ESQUIRE

By: /Kenneth LaFiandra/
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215-588-9978
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<i>Respondent.</i>	:	

CERTIFICATE OF SERVICE

I Kenneth LaFiandra, hereby certify that I have this day served a copy of Complainant’s Reply in Opposition to Preliminary Objections to the Complaint in the above captioned matter upon Respondent’s counsel by: email scanning and mailing a copy, via first class U.S. Mail postage prepaid to the below address:

Shawane L. Lee
Counsel for PECO Energy Company
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Fax: 215-568-3389
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Date: 5.14.17

COMPLAINANT KENNETH LAFIANDRA,
ESQUIRE

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