

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Hampden Township	:	
	:	
v.	:	C-2017-2604425
	:	
PPL Corporation and	:	
PPL Electric Utilities Corporation	:	

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

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

A municipality filed a complaint against an electric utility and its holding company alleging that the utility has improperly retained funds paid to the utility on behalf of the municipality. This decision dismisses the complaint because the complaint fails to allege that the utility violated Commission statutes, regulations or orders.

HISTORY OF THE PROCEEDING

On April 28, 2017, Hampden Township (Complainant) filed a complaint with the Commission against PPL Corporation (PPL) and PPL Electric Utilities Corporation (PPLEU). While the caption of the complaint refers to two separate entities, the body of the complaint refers only to PPL. For the sake of consistency, I will refer to PPL while summarizing the allegations in the complaint.

The complaint alleges that in May 2008, Patrick Joseph McLaine (McLaine) and Robert J. Kearns (Kearns), who operated a business known as Municipal Energy Managers, Inc. (MEM), approached the Complainant and proposed to the Complainant a procedure through which the Complainant could purchase its municipal street lighting system from PPL which would result in significant financial savings to the Complainant. McLaine and Kearns represented to the Complainant that the savings from the proposed transaction would exceed \$235,000 per year. McLaine and Kearns represented that PPL's Commission-approved tariff authorized the proposed procedure.

The complaint alleges that on June 26, 2009, the Complainant entered into a Guaranteed Turnkey Performance Agreement with Kearns and McLaine for the purpose of providing services for the acquisition and conversion of the municipal street lighting system within the Complainant's boundaries from PPL to the Complainant (the Project). The complaint states that as part of the Project, McLaine and Kearns informed the Complainant that it was required to make a payment in the total amount of \$1,312,000 for work related to the Project. Of that amount, McLaine and Kearns stated to the Complainant that \$546,000 would be immediately transmitted to PPL and held for the benefit of the Complainant for future work related to the Project.

The complaint asserts that, pursuant to the instructions of McLaine and Kearns, on June 26, 2009, the Complainant made a wire transfer of funds to Kearns and McLaine in the amount of \$546,000. Also on June 26, 2009, Kearns and McLaine transmitted, via a wire transfer, the \$546,000 payment to PPL. The complaint avers that PPL has admitted receiving the \$546,000 payment and that it has retained the \$546,000 payment.

On June 29, 2009, the Complainant made two additional wire transfers of funds to Kearns and McLaine in the amounts of \$266,000 and \$500,000 for the Project. The three payments totaled \$1,312,000.

According to the complaint, on June 30, 2009, Kearns and McLaine met with PPL during which PPL informed Kearns and McLaine that PPL intended to retain the \$546,000

payment and to apply it to a series of invoices totaling \$473,452.49 issued by PPL to MEM for the street light transfer projects of other municipalities. The complaint alleges that in the June 30th meeting, McLaine and Kearns objected to PPL's intended application of the \$546,000 payment. The complaint states that PPL has acknowledged receiving the \$546,000 payment from Kearns and McLaine on June 29, 2009 and admits that it applied that payment to invoices for work performed for street light transfer projects of other municipalities in Pennsylvania.

The complaint contends that the Project was never completed for the Complainant and that it never received any of the benefit of the Project or any value for the payments it made, including the \$546,000 currently in the possession of PPL.

According to the complaint, on July 11, 2016, Kearns and McLaine pled guilty in the Court of Common Pleas of Cumberland County to failure to make required disposition of funds in violation of Section 3927 of the Crimes Code. 18 Pa. C.S.A. § 3927, in connection with the \$1,312,000 paid by the Complainant to Kearns and McLaine. The amounts for which McLaine and Kearns pled guilty included the \$546,000 payment made on June 26, 2009 by the Complainant to McLaine and Kearns which was sent in turn to PPL.

On January 30, 2017, the Complainant sent a demand to PPL requesting the return of the \$546,000 payment which had been stolen from the Complainant by Kearns and McLaine and transferred to PPL. By letter dated February 15, 2017, PPL refused the Complainant's request for return of the \$546,000.

The complaint contends that because Kearns and McLaine acknowledged that the \$546,000 is property stolen from the Complainant, PPL has no legal or equitable right in the stolen property and has no legal or equitable justification to continue to retain property which is stolen. The complaint contends that the Commission should direct and order PPL to return to the Complainant the \$546,000 that Kearns and McLaine stole from the Complainant. Alternatively, the Complainant requests that the Commission institute an investigation into the matter concerning the \$546,000 stolen from the Complainant and, after investigation, order that PPL return the \$546,000 to Hampden together with interest.

As part of the complaint, the Complainant has petitioned for a declaratory order, pursuant to 52 Pa. Code § 5.42. In this petition, the Complainant requests that the Commission issue an order determining that the payment to PPL of \$546,000 constitutes property stolen from the Complainant, that PPL has no legal or equitable right to retain that stolen property and that PPL be directed to return the \$546,000 to the Complainant.

On June 5, 2017, PPL and PPLEU filed an answer with new matter. The answer states that PPL is the parent holding company for PPLEU. The answer denies that PPL provides public utility services.

The answer admits that the Complainant entered into an agreement with Kearns and McLain. The answer admits that PPLEU received a wire transfer from MEM in the amount of \$546,000.

The answer admits that PPLEU met with MEM on June 30, 2009. The answer denies that MEM objected to PPLEU applying the payment to MEM's existing invoices related to street light projects for other municipalities, unrelated to the Complainant. According to the answer, MEM did not advise PPLEU that the payment was for future work to be done for the Complainant nor did MEM request that the funds be applied to future work to be performed for the Complainant. The answer asserts that there was no invoice from MEM related to a street light project for the Complainant to which PPLEU could apply MEM's payment.

The answer admits that Kearns and McLaine plead guilty to committing crimes. However, the answer indicates that PPL and PPLEU have no knowledge or information concerning the facts underlying the criminal charges and subsequent guilty pleas.

The answer denies that PPLEU possesses the \$546,000 payment from MEM. PPLEU applied the payment to MEM's existing invoices relating to its street light projects for other municipalities.

The new matter asserts that Kearns and McLaine and MEM were agents of the Complainant and that the Complainant is solely responsible for the actions of its agents. The new matter states that, to the extent that Kearns and McLaine or MEM failed to apply payments on behalf of the Complainant, the Complainant's remedy is against Kearns and McLaine or MEM, not PPL or PPLEU.

According to the new matter, on July 5, 2011, the Complainant's solicitor sent an email to PPLEU concerning the \$546,000 wire transfer that PPLEU received from MEM. The new matter alleges that on July 7, 2011, PPLEU replied to solicitor's email stating that PPLEU applied the payment it received from MEM on June 26, 2009 to MEM's invoices for work done on projects unrelated to the Complainant.

The new matter asserts that criminal charges were filed against Kearns and McLaine on December 13, 2012. The new matter further alleges that Kearns and McLaine filed a Chapter 7 Bankruptcy. The new matter contends that to the extent that payments by the Complainant were stolen by Kearns and McLaine or MEM, the Complainant's remedy was to participate as a creditor in the Chapter 7 Bankruptcy.

The new matter asserts that the complaint is an attempt to plead a cause of action for conversion of stolen money. The new matter argues that the Commission lacks jurisdiction over the Complainant's claim for conversion of stolen money.

The new matter points out that the relief sought in the complaint is a request for monetary damages. The new matter states that the Commission lacks authority to award monetary damages.

The new matter argues that the claims in the complaint are barred by the statute of limitations at 66 Pa. C.S. § 3314.

The new matter alleges that the complaint fails to allege that PPL or PPLEU violated the Public Utility Code, Commission regulations or orders or PPLEU's Commission-approved tariff.

The new matter states that PPL did not have any involvement in any of the claims raised in the complaint. The answer with new matter requests that the Commission dismiss the Complainant's complaint.

On June 5, 2017, PPL and PPLEU also filed preliminary objections. The preliminary objections contend that the complaint is legally insufficient, pursuant to 52 Pa.Code § 5.101(a)(4). The preliminary objections contend that the complaint fails to state a claim that either PPL or PPLEU has violated a provision of the Public Utility Code, Commission regulation, or Commission order. Therefore, the complaint has failed to state a claim upon which relief can be granted.

The preliminary objections also contend that the complaint seeks relief from an entity over which the Commission lacks jurisdiction. The preliminary objections point out that PPL is parent holding company of PPLEU. However, PPL is not a public utility or an electric distribution company. The preliminary objections argue that the Public Utility Code does not authorize the Commission to regulate entities other than public utilities or electric distribution companies. The preliminary objections request that the Commission dismiss the Complainant's complaint.

On June 15, 2017, the Complainant filed an answer to PPL's and PPLEU's preliminary objections. The answer generally denies the allegations in the preliminary objections. The answer requests that the Commission deny PPL's and PPLEU's preliminary objections.

On June 26, 2017, the Complainant filed an answer to PPL's and PPLEU's new matter. The answer generally admits the allegations concerning Kearns and McLaine or MEM

since those allegations are stated in the Complainant's complaint. The answer requests that the Commission dismiss the new matter and sustain the Complainant's complaint.

By notice dated July 3, 2017, the Commission notified the parties that it had assigned the case to me as motion judge. The preliminary objections are ready for decision. For the reasons set forth below, I will sustain the preliminary objections and dismiss the complaint.

FINDINGS OF FACT

1. The Complainant in this case is Hampden Township.
2. The Respondents in this case are PPL and PPLEU.
3. On April 28, 2017, the Complainant filed a complaint with the Commission against the Respondents.
4. The Respondents filed an answer to the complaint on June 5, 2017.
5. On June 5, 2017, the Respondents filed preliminary objections.
6. On June 15, 2017, the Complainant filed an answer to the preliminary objections.
7. On June 26, 2017, the Complainant filed an answer to the new matter.

DISCUSSION

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa.Code § 5.101(a) as follows:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.
7. Standing of a party to participate in the proceeding.

Here, the Respondent's preliminary objections assert that the complaint is legally insufficient, pursuant to 52 Pa.Code § 5.101(a)(4), in that the complaint fails to allege that the Respondent violated the Public Utility Code, Commission regulations or orders or its tariff provisions. I agree.

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 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 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 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)(4) permits the filing of a preliminary objection to dismiss a pleading for legal insufficiency. The provision at 52 Pa.Code § 5.101(a)(4) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 557 (Pa.Cmwlt. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa.Cmwlt. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa.Cmwlt. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa.Super. 1954).

Viewing the complaint in this case in the light most favorable to the Complainant, on June 26, 2009, the Complainant entered into a Guaranteed Turnkey Performance Agreement with Kearns and McLaine for the purpose of providing services for the acquisition and conversion of the municipal street lighting system within the Complainant's boundaries to the ownership of the Complainant.

The Complainant made a wire transfer of funds to Kearns and McLaine in the amount of \$546,000. Also on June 26, 2009, Kearns and McLaine transmitted via a wire transfer the \$546,000 payment to PPLEU. PPLEU received the \$546,000 payment and has retained the \$546,000 payment. PPLEU retained the \$546,000 payment and applied it to a series of invoices

totaling \$473,452.49 issued by PPLEU to MEM which concerned the street light transfer projects of other municipalities. The Complainant's streetlight project was never completed and it never received any of the benefit of the street light project or any value for the payments it made to Kearns and McLaine, including the \$546,000 paid to PPLEU.

Kearns and McLaine pled guilty in the Court of Common Pleas of Cumberland County to failure to make required disposition of funds in violation of Section 3927 of the Crimes Code. 18 Pa. C.S.A. § 3927. The amounts for which McLaine and Kearns pled guilty included the \$546,000 payment on June 26, 2009 from the Complainant to McLaine and Kearns which was sent to PPLEU.

On January 30, 2017, the Complainant sent a demand to PPLEU requesting the return of the \$546,000 payment. PPLEU refused the Complainant's request for return of the \$546,000 payment.

Accepting the facts outlined above as true for purposes of disposing of its preliminary objection, the Respondent contends that the complaint fails to allege that the Respondent has violated the Public Utility Code, Commission regulations or orders. The Respondent concludes that the complaint is legally insufficient. I agree.

In order to be legally sufficient, a complaint must set forth "an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission." 52 Pa.Code § 5.22(a)(4). Here, the complaint fails to allege what Commission statute, regulation or order either PPL or PPLEU has violated. While the complaint alleges that PPLEU's tariff authorized the proposed transfer of the street lights from PPLEU to the Complainant, the complaint fails to allege which tariff provision PPLEU violated or how PPLEU violated the tariff.

To the extent that the Complainant is requesting that the Commission determine that PPLEU fraudulently or improperly retained the \$546,000 payment, the Commission lacks

the authority to make such a determination. The Commission can only determine whether PPLEU violated the Public Utility Code or Commission regulations, not whether its conduct was fraudulent. It is the province of the courts, not the Commission, to determine fraud, negligence or 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).

In addition, while 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.Cmwlth. 1995).

Finally, the statute of limitations at 66 Pa.C.S. § 3314 is applicable to this proceeding. The statute of limitations at 66 Pa.C.S. § 3314 is non-waivable. 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. Reuben v. O'Brien, 445 A.2d 801 (Pa. Super 1982).

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.

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. Pennsylvania 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). Since the statute 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, it is appropriate for me to raise and apply the statute of limitations in this proceeding.

Applying the three year statute of limitations at 66 Pa.C.S. §3314 to this case, the Complainant filed its complaint on April 18, 2017. I will, therefore, bar any claims by the Complainant for events that occurred prior to April 18, 2014.

Here, Kearns and McLaine, acting on behalf of the Complainant, transmitted, via a wire transfer, the \$546,000 payment to PPLEU on June 26, 2009. This event gave rise to the cause of action alleged in the Complainant's complaint. The Complainant's claim to refund of this money arose prior to April 18, 2014 and is therefore barred by the statute of limitations.

Assuming that the Complainant was not aware of how PPLEU had disposed of the money on June 26, 2009, it became aware afterwards. According to the new matter, on July 5, 2011, the Complainant's solicitor sent an email to PPLEU concerning the \$546,000 wire transfer. The new matter alleges that on July 7, 2011, PPLEU replied to the Complainant's solicitor stating that PPLEU applied the payment it received from MEM on June 26, 2009 to MEM's invoices for work done on projects unrelated to the Complainant. The Complainant's answer to new matter does not deny the substance of these assertions.

Therefore, as of July 7, 2011, the Complainant became aware that PPLEU had applied the payment it received from Kearns and McLaine to projects unrelated to the Complainant. The Complainant became aware of the disposition of the payment prior to April 18, 2014. The Complainant's claim to refund of this money arose prior to April 18, 2014 and is therefore barred by the statute of limitations.

Since the Complainant's complaint does not set forth any violation of a Commission regulation, statute or order, it is legally insufficient. In addition, the Commission lacks authority to determine fraud, negligence or other causes of action that do not require the Commission's expertise or to award damages for those causes of action. Finally, The Complainant's claim is barred by the statute of limitations. I will sustain the Respondent's preliminary objection and enter the following order.

CONCLUSIONS OF LAW

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

2. The Complainant's complaint fails to state a claim upon which relief can be granted. 52 Pa.Code § 5.101(a)(4).

3. The Commission lacks the authority to determine fraud, negligence or other causes of action that do not require the Commission's specialized knowledge. DeFrancesco v. Western Pennsylvania Water Co., 499 Pa. 374 (1982).

4. The Commission lacks the 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.Cmwlth. 1995).

5. The statute of limitations at 66 Pa.C.S. § 3314 is non-waivable. Reuben v. O'Brien, 445 A.2d 801 (Pa. Super 1982).

6. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2017-2604425 be dismissed.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by PPL Corporation and PPL Electric Utilities Corporation at Docket No. C-2017-2604425 are sustained.
2. That the complaint of Hampden Township at Docket No. C-2017-2604425 against PPL Corporation and PPL Electric Utilities Corporation is dismissed.
3. That the docket at Docket No. C-2017-2604425 is marked closed.

Date: July 10, 2017

_____/s/
David A. Salapa
Administrative Law Judge