

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Robert G. Kuhn, Jr.	:	
	:	C-2017-2610584
v.	:	
	:	
Duquesne Light Company	:	

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

Before
David A. Salapa
Administrative Law Judge

INTRODUCTION

A property owner filed a complaint against an electric utility objecting to the utility's attempts to perform vegetation management and remove trees from the owner's property, pursuant to an easement agreement granting the utility access to the owner's property. This decision dismisses the complaint because the Pennsylvania Public Utility Commission (Commission) lacks subject matter jurisdiction over disputes involving real property rights.

HISTORY OF THE PROCEEDING

On May 30, 2017, Robert G. Kuhn, Jr. (Complainant) filed a complaint with the Commission against Duquesne Light Company (Respondent). The complaint alleges that the Respondent is attempting to increase the width of its right of way which crosses the Complainant's property. The complaint alleges that the Respondent's right of way is 65 feet wide, according to a property survey of the Complainant's property.

The complaint further asserts that the Respondent provided the Complainant with a document from 1926 describing the Respondent's right of way. The complaint contends that this document fails to specifically indicate where the right of way is located or how wide it is. Since the document is ambiguous, the complaint contends that determination of the width of the Respondent's right of way should be based on the Respondent's past conduct.

The complaint alleges that the Respondent proposes to remove trees from its right of way located on the Complainant's property as part of its vegetation management plan. The complaint asserts that the trees the Respondent proposes to remove are outside its right of way. The complaint requests that the Commission direct that the Respondent survey and mark the boundaries of its right of way.

The Respondent filed an answer with new matter and preliminary objections on July 11, 2017. The answer admits that the Respondent plans to perform vegetation management on the Complainant's property. The answer denies that the Respondent lacks the authority to perform this vegetation management, pursuant to its right of way agreement. The answer asserts that the Respondent possesses the authority to perform the proposed vegetation management, pursuant to its right of way agreement.

The answer states that on December 29, 2016 and June 16, 2017, the Respondent's supervisor of vegetation management met with the Complainant and explained what work would be performed on the Complainant's property.

The new matter incorporates the statements in the answer and asserts that the Commission lacks jurisdiction to determine the scope and validity of the Respondent's right of way. The answer with new matter requests that the Commission dismiss the complaint.

The preliminary objections contend that the subject matter of the Complainant's complaint is outside the Commission's jurisdiction. The preliminary objections point out that the Commission lacks jurisdiction over claims that arise from real property disputes. According to the preliminary objections, the allegations in the complaint assert that the Respondent is

attempting to act beyond the scope of its property rights set forth in the easement agreements and that the Complainant's property rights are being violated. The preliminary objections conclude that the Commission lacks jurisdiction to resolve disputes involving property rights.

On July 19, 2017, the Complainant filed an answer to the Respondent's new matter. The answer to new matter denies that the Commission lacks jurisdiction over the Complainant's complaint. The answer to new matter argues that the Respondent's course of conduct should supersede the Respondent's 1926 right of way agreement. The answer to new matter requests that the Commission order the relief sought in the complaint.

On July 19, 2017, the Complainant filed an answer to the Respondent's preliminary objections. The Complainant's answer reasserts the arguments in the Complainant's answer to new matter concerning the Respondent's course of conduct. The answer requests that the Commission dismiss the Respondent's preliminary objections and conduct a hearing on the Complainant's complaint.

By notice dated August 16, 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 Robert G. Kuhn, Jr.
2. The Respondent in this case is Duquesne Light Company.
3. On May 30, 2017, the Complainant filed a complaint with the Commission against the Respondent.
4. The Respondent filed an answer with new matter on July 11, 2017.

5. On July 11, 2017, the Respondent filed preliminary objections.
6. On July 19, 2017, the Complainant filed an answer to new matter.
7. On July 19, 2017, the Complainant filed an answer to preliminary objections.

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 lack of Commission jurisdiction pursuant to 52 Pa.Code § 5.101(a)(1).

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994)

Equitable). A preliminary objection asserting lack of Commission jurisdiction, pursuant to the Commission's Rules of Practice and Procedure, is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources, 406 A.2d 1020 (Pa. 1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa.Super. 1991). The Commission follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa.Cmwlt. 1988). The Commission must view the factual assertions in the complaint in this case in the light most favorable to the 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.

The Commission regulation at 52 Pa.Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa.Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa.Code § 5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa.Code § 5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 557

(Pa.Cmwlth. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa.Cmwlth. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa.Cmwlth. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa. Super. 1954).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Tod and Lisa Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937 (Opinion and Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa.Super. 1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa.Cmwlth. 1992) alloc. denied 637 A.2d 293 (Pa. 1993).

Viewing the factual assertions in the complaint in this case in the light most favorable to the Complainant for purposes of disposing of the preliminary objections, the Respondent is attempting to increase the width of its right of way which crosses the Complainant's property. The Respondent proposes to remove trees from its right of way located on the Complainant's property as part of its vegetation management plan. The Complainant disputes that the Respondent's right of way agreement authorizes the Respondent to remove the trees from the property.

Accepting the facts alleged in the complaint as true for purposes of disposing of its preliminary objection, the Respondent alleges that the complaint raises issues that are outside the subject matter jurisdiction of the Commission. I agree. Both the Pennsylvania Supreme Court and the Commission have previously addressed this issue.

In Fairview Water Co. v. Pa. Pub. Util. Comm'n, 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission lacks jurisdiction to determine the scope and validity of an easement. The Commission has determined that it is not the proper forum for

resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Opinion and Order entered July 3, 2003); Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Opinion and Order entered September 15, 1999).

Concerning the scope and validity of easements, the Commission has described the limits of its jurisdiction in several cases. In Boczar v. PPL Electric Utilities Corp., Docket No. C-20016332 (Opinion and Order entered February 10, 2003), the complainant alleged that the utility was not authorized to place its poles, transformers and cable lines on his property. The Commission noted that the utility produced right of way agreements for the facilities in question. The Commission concluded that it lacked jurisdiction to determine property rights concerning these easements.

In Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic Pennsylvania, Inc., Docket No. C-00945842 (Final Order entered October 25, 1995), the Commission stated that real property issues, such as trespass and whether utility facilities were located pursuant to a valid easement are within the exclusive jurisdiction of the Courts of Common Pleas.

In Messina v Bell Atlantic-Pennsylvania, Docket No. C-00968225 (Opinion and Order entered September 23, 1998), the Commission stated that it could adjudicate cases involving the existence rather than the scope and validity of an easement.

Finally, in Stavnicky v PPL Electric Utilities Corp., Docket No. C-20043368 (Final Order entered July 13, 2005) (Stavnicky), the Commission held that its subject matter jurisdiction in right of way disputes extended only to cases where there was no written documentation of an easement. If the utility produced a document purporting to show a grant of authority for an easement concerning a complainant's property, the Commission's inquiry should be at an end. The Commission determined that it lacked jurisdiction because the utility presented written documentation of its easements. The Commission followed Stavnicky in Vale Vista

Associates, LP v. West Penn Power Co., Docket No. C-2015-2517345 (Final Order entered March 29, 2016) (Vale Vista).

Here, the Complainant has acknowledged in his complaint that the Respondent has a right of way agreement authorizing it to use a portion of the Complainant's property for its transmission lines. The issue raised in the Complainant's complaint is whether the right of way agreement authorizes the Respondent to remove the trees from his property. The Complainant's complaint contends that the trees the Respondent wishes to remove are not within the right of way described in the right of way agreement.

Accepting as true all the facts alleged in the complaint, the Complainant is not entitled to relief as a matter of law. The dispute alleged in the complaint is whether the Respondent may remove trees from the Complainant's property, pursuant to its easement agreement. Since the Complainant has acknowledged an easement agreement, the Commission's decisions in Stavnicky and Vale Vista require that the Commission dismiss the Complainant's complaint.

As set forth above, the Commission lacks subject matter jurisdiction to adjudicate real property disputes, including the scope and validity of easements. Since the Commission's jurisdiction does not extend to adjudicating real property disputes, I will sustain the preliminary objections and enter the following order.

CONCLUSIONS OF LAW

1. The Commission lacks jurisdiction to resolve property rights controversies. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Order entered July 3, 2003).

2. The Commission lacks jurisdiction to determine the scope and validity of an easement. Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985)

3. It is just, reasonable and in the public interest that the complaint filed at Docket No. C-2017-2610584 be dismissed.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by Duquesne Light Company at Docket No. C-2017-2610584 are sustained.

2. That the complaint of Robert G. Kuhn, Jr. at Docket No. C-2017-2610584 against Duquesne Light Company is dismissed for lack of jurisdiction.

3. That the docket at Docket No. C-2017-2610584 is marked closed.

Date: August 17, 2017

/s/

David A. Salapa
Administrative Law Judge