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- June 12, 2019

**VIA E-FILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

**Re: GECO Holding, Ltd. v. West Penn Power Company**  
**Docket No. C-2019-3010108**

Dear Secretary Chiavetta:

Attached please find the Preliminary Objection of West Penn Power Company in the above-referenced matter. This document has been served on the Complainant as shown in the Certificate of Service.

Please contact me if you have any questions.

Very truly yours,



Aron J. Beatty

krak  
Enclosures

c: As per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**GECO HOLDING, LTD.**

v.

**WEST PENN POWER COMPANY**

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**Docket No. C-2019-3010108**

**NOTICE TO PLEAD**

TO: GECO HOLDING, LTD.

Pursuant to 52 Pa. Code § 5.101, you are hereby notified that if you do not file a reply to the enclosed Preliminary Objection of West Penn Power Company within **ten (10) days** from service of this notice, the facts set forth by West Penn Power Company in the Preliminary Objection may be deemed to be admitted, thereby requiring no other proof. All pleadings, such as a Reply to Objection, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with copy service to counsel for West Penn Power Company, and where applicable, the Administrative Law Judge presiding over the case.


File with:

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

With a copy to:

Aron J. Beatty  
FirstEnergy Service Company  
2800 Pottsville Pike  
P.O. Box 16001  
Reading, Pennsylvania 19612-6001

Date: June 12, 2019

  
Aron J. Beatty

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>GECO HOLDING, LTD.</b>	:	
	:	
v.	:	<b>Docket No. C-2019-3010108</b>
	:	
<b>WEST PENN POWER COMPANY</b>	:	

**PRELIMINARY OBJECTION TO THE FORMAL COMPLAINT OF  
GECO HOLDING, LTD.**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, West Penn Power Company ("West Penn" or the "Company"), by and through its counsel, Aron J. Beatty, files this Preliminary Objection pursuant to Section 5.101(a) of Pennsylvania Public Utility Commission ("Commission") regulations, 52 Pa. Code § 5.101(a)(1), and in support thereof, avers as follows:

**I. Introduction**

1. In his Formal Complaint, GECO Holding, Ltd. ("Complainant") alleges that the Company's electric utility facilities on the property at 13321 Midvale Road, Waynesboro, Pennsylvania currently "interferes with customer's operation on the property." Compl. ¶ 4. The Complainant requests that the Commission direct West Penn to "relocate the poles and electric line which crosses customer's property," and to do so "all at the expense of West Penn Power." Compl. ¶ 5.

2. As explained below, the Commission does not have the jurisdictional power or legal authority to evaluate the scope and validity of a right of way or easement agreement. As a result, the Company requests that this Preliminary Objection be granted and that the Commission: (i) strike all allegations in the Formal Complaint regarding the scope and validity of a right of way or easement agreement; (ii) expressly prohibit the Complainant from introducing any testimony or

exhibits at any evidentiary hearing regarding the scope and validity of a right of way or easement agreement; (iii) dismiss the Formal Complaint in its entirety with prejudice; and (iv) grant the Company such other relief as may be just and reasonable under the circumstances.

## **II. Background**

3. West Penn is an electric distribution company certificated as a public utility permitted to operate within the Commonwealth in Pennsylvania.

4. On or about May 17, 2019, the Complainant filed a Formal Complaint with the Commission against West Penn at the above-captioned docket requesting that the Commission direct the Company to relocate its facilities on the Complainant's property at the sole expense of West Penn Power. Compl. ¶ 5.

5. On or about May 23, 2019, the Formal Complaint was electronically served on West Penn.

6. West Penn is timely filing its Answer and New Matter contemporaneously with this Preliminary Objection.

## **III. Argument**

7. The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are 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.

8. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994). Where the facts set forth in the non-moving party's pleading are accepted as true, preliminary objections should be granted where the moving party would still prevail as a matter of law. *See id.*; *see also* *Cty. of Allegheny v. Pa.*, 490 A.2d 402 (Pa. 1985); *Pa. v. The Bell Tele. Co. of Pa.*, 551 A.2d 602 (Pa. Commw. Ct. 1988).

9. The Commission's procedural regulations allow a party to object to pleadings relating to matters outside of Commission jurisdiction. *See* 52 Pa. Code § 5.102(a)(1).

10. In the Formal Complaint, the Complainant only raises issues related to the scope and validity of a Company right of way, alleging that the attached right-of-way agreement requires West Penn to relocate existing "poles and utility line." Compl. ¶ 4. The Complainant's analysis of the right-of-way agreement leads it to conclude that the following, sole request for relief should be granted:

Customer requests that West Penn Power relocate the poles and electric line which crosses customer's property to the edge of the boundary line of customer's property, all at the expense of West Penn Power.

Compl. ¶ 5.

11. Clearly, the only relief sought through the Formal Complaint is a determination as to the scope and validity of a right of way or easement.

12. The Commission possesses only the authority the legislature has specifically granted to it in the Public Utility Code ("Code"), 66 Pa.C.S. §§ 101, *et seq.*

13. The Commission's jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Auth. v. Pa. Pub. Util. Comm'n.*, 237 A.2d 602 (Pa. 1967); *see also City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Commw. Ct. 1978).

14. Parties to an action may not confer jurisdiction upon a tribunal where none exists. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

15. A challenge to subject matter jurisdiction is never waived; this jurisdictional question may be raised at any stage of the judicial process. *Commw. v. Atlantic & Gulf Coast Stevedores, Inc.*, 221 A.2d 128 (Pa. 1966).

16. The mere fact that a party to an action qualifies as a regulated utility does not automatically confer subject matter jurisdiction upon the Commission. *DeFrancesco v. Western Pa. Water Co.*, 453 A.2d 595 (Pa. 1982).

17. As directed by Section 501 of the Code, 66 Pa.C.S. § 501, the Commission must "enforce, execute and carry out, by its regulations, orders or otherwise" the provisions of the Code.

18. Section 701 of the Code, 66 Pa.C.S. § 701, allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer.

19. The Commission lacks subject matter jurisdiction to entertain and resolve this dispute, which does not fall within the scope of the Code. The Commission does not have jurisdiction over private contractual disputes between a citizen and a utility. *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. Super. Ct. 1978) ("It has long been recognized

that the reasonableness, adequacy and sufficiency of public utility service are all matters within the exclusive original jurisdiction of the PUC....It is equally well-settled, however, that the PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility.”); *see also Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Hoch v. Phila. Elec. Comp.*, 492 A.2d 27 (Pa. Super. Ct. 1985).

20. The Commission has repeatedly held that the Court of Common Pleas, rather than the Commission, has jurisdiction over substantive property disputes, including the validity of right of ways, whether the utility’s work occurred within a right of way, and the location of a utility’s right of way. *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Order entered Sept. 15, 1999); *Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic-Pa., Inc.*, Docket No. C-00945872 (Order entered Oct. 25, 1996); *Boczar v. PPL Elec. Utils.*, Docket No. C-20016332 (Order entered Feb. 10, 2003); *Perrige v. Metro. Edison Co.*, Docket No. C-00004110 (Order entered Jul. 11, 2003); *Williamson v. Duquesne Light Co.*, Docket No. C-2009-2138578 (Opinion and Order entered Feb. 10, 2011).

21. The only issues raised within the Formal Complaint, and the only relief requested, relate to the scope and validity of a Company right of way.

22. The Commission has no jurisdiction to adjudicate any of the issues within the Formal Complaint.


23. Accordingly, the Company’s preliminary objection should be granted, and the Formal Complaint should be dismissed for lack of Commission jurisdiction.

**IV. Conclusion**

WHEREFORE, for the foregoing reasons, West Penn Power Company respectfully requests that the Commission: (i) strike all allegations in the Formal Complaint regarding the scope and validity of a right of way or easement agreement; (ii) expressly prohibit the Complainant from introducing any testimony or exhibits at any evidentiary hearing regarding the scope of validity of a right of way or easement agreement; (iii) dismiss the Formal Complaint in its entirety with prejudice; and (iv) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,

Dated: June 12, 2019

  
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Counsel for West Penn Power Company

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the Preliminary Objection of West Penn Power Company to the Formal Complaint of GECO Holding, Ltd. upon the individual listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, as follows:

William C. Cramer, Esq.  
220 Lincoln Way East  
Chambersburg, PA 17201  
Counsel for GECO Holding, Ltd.

Dated: June 12, 2019



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