BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Debra Reid,	:	
Complainant,	:	**Complaint Docket No. C-2019-3010073**
v.	:	
Mill Creek MHP Management, LLC,	:	
Respondent.	:	

BRIEF IN SUPPORT OF
PETITION FOR INTERLOCUTORY COMMISSION REVIEW

Pursuant to 52 Pa.Code Section 5.302(B), Respondent Mill Creek MHP Management, LLC ("Mill Creek Management"), files the following Brief in Support of Petition for Interlocutory Commission Review of the Order Denying Preliminary Objections.

A. Concise Statement of the Case.

On or about May 22, 2019, Complainant Debra Reid filed a formal complaint against Mill Creek Management with the Public Utility Commission. Ms. Reid is a resident of the Mill Creek Mobile Home Park (the "Mill Creek MHP") located in York Township, York County. Mill Creek Management operates a natural gas master meter system in the Mill Creek MHP and is registered with the PUC as a pipeline operator under Docket No. A-2017-2597480.[1]

In her *pro se* Complaint, Ms. Reid alleges that she is having several problems with Mill Creek Management:

[1] The Commission's Rules of Administrative Practice and Procedure provide for the incorporation of records from other proceedings and the official and judicial notice of facts. 52 Pa. Code Sections 5.407, 5.408. *See also, Pennsylvania Public Utility Commission, et al v. Newtown Artesian Water Company*, Docket No. R 00943157 (Final Order entered June 26, 1995) 1995 Pa. PUC LEXIS 68 (Pa. PUC 1995).

- There are incorrect charges on her bills from Mill Creek Management.
- Mill Creek Management is billing her for natural gas at a rate that is "6.5 times more than the legally established rate."
- Mill Creek Management is "illegally operating as a utility/distribution company without license to do so."
- Mill Creek Management is "charging 173 homeowners excessive rates for usage."
- Mill Creek Management is charging her "for more units [of natural gas] . . . than the master meter read for the entire MHP of 173 homes."

See, Complaint, Pages 2 and 3. In order to remedy these problems, Ms. Reid asks the Commission to:

- Investigate and fine Mill Creek Management for "operating illegally as a utility/distribution company."
- Order Mill Creek MHP to bill all homeowners for gas usage "according to the established rates established and published by the PUC."
- Order Mill Creek Management to reimburse her for all "gas overages" she has been billed and for which she has paid since signing her lease at Mill Creek MHP.
- Order Mill Creek Management to stop harassing her and threatening her with eviction for unpaid rent.

See, Complaint, Page 3.

On or about June 11, 2019, Mill Creek Management filed a timely Answer and New Matter to the Formal Complaint. Mill Creek Management also filed timely Preliminary Objections to the Formal Complaint at the same time. Ms. Reid did not answer Mill Creek Management's New Matter or Mill Creek Management's Preliminary Objections.

In its Preliminary Objections, Mill Creek Management sought to have Ms. Reid's complaint dismissed for failure to state a claim upon which relief can be granted and for lack of Commission jurisdiction over Ms. Reid's claims. The Presiding Officer, in an order dated August 12, 2019, denied Mill Creek Management's Preliminary Objection and directed that the complaint proceed to a hearing. In particular, the Presiding Officer denied the Preliminary Objections because Ms. Reid alleges that Mill Creek Management is operating as a public utility and that Mill Creek Management is violating the Public Utility Code and Ms. Reid, therefore, should be allowed to testify about her allegations under the Commission's decision in *Richard Carlock v. The United Telephone Company of Pennsylvania*, Docket No. F-00163617 (Order entered July 14, 1993). *See,* Order Denying Preliminary Objections, Page 5. An Initial Call-In Telephone Hearing has been scheduled for September 26, 2019.

B. Reference to the Record.

Mill Creek Management is registered as a pipeline operator at Commission Docket No. A-2017-2597480. *See,* Footnote 1. The issue in question here is found in the Presiding Officer's August 12, 2019, Order Denying Preliminary Objections.

C. Argument.

Question for Review:

> May the Commission exercise jurisdiction over a complaint against a natural gas master meter operator that is registered with the Commission as a pipeline operator if the complaint seeks relief unrelated to the federal pipeline safety laws?

Suggested Answer:

No. The Commission may not exercise jurisdiction over a complaint against a natural gas master meter operator that is registered with the Commission as a pipeline operator if the complaint seeks relief unrelated to the federal pipeline safety laws.

1. Summary of Argument.

In ruling upon preliminary objections, the Commission must accept as true all well-pleaded facts and inferences therefrom, but it may not accept as true legal conclusions, unsupported inferences, arguments, or opinions. Where a *pro se* complainant concludes in her complaint, without any supporting facts, that a registered pipeline operator is operating as an illegal public utility and is violating the Public Utility Code, the Commission may not accept those unsupported legal conclusions as true. Moreover, where that complaint only raises claims against the pipeline operator unrelated to the federal pipeline safety laws, the Commission may not exercise jurisdiction over that complaint.

2. Argument.

Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390, 393 (Pa.Cmwlth. 1992). The Commission's jurisdiction must arise from the express language of its enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 794 (Pa. 1977). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano*, 235 A.2d 602, 603-04 (Pa. 1967).

As noted above, Mill Creek Management is a pipeline operator for purposes of the Gas and Hazardous Liquids Pipelines Act (the "Pipelines Act"). The Commission, therefore, only has jurisdiction over Mill Creek Management for those purposes set forth in the Pipelines Act.

See, 58 P.S. Section 801.504(a). The Commission does not have jurisdiction over Mill Creek Management "for purposes of rates or ratemaking or any purpose other than those set forth in [the Pipelines Act]." *See*, 58 P.S. Section 801.504(a). Moreover, nothing in the Pipelines Act "grants the commission additional authority to determine or regulate" Mill Creek Management "as a public utility as defined in 66 Pa.C.S. Section 102 (relating to definitions) or as a natural gas supplier or natural gas supply services as defined in 66 Pa.C.S. Section 2202 (relating to definitions)." *See*, 58 P.S. Section 801.504(a).

Under Section 501(a) of the Pipelines Act, the Commission has "general administrative authority to supervise and regulate pipeline operators within this Commonwealth consistent with Federal pipeline safety laws." 58 P.S. Section 801.501(a). In addition, the Commission "may adopt regulations, consistent with the Federal pipeline safety laws, as may be necessary or proper in the exercise of its powers and perform its duties under [the Pipelines Act]." *Id.* Any such regulations, however, "shall not be inconsistent with or greater or more stringent than the minimum standards and regulations adopted under the Federal pipeline safety law." *Id*.

The "federal pipeline safety laws" are defined in Section 102 of the Pipelines Act as "The provisions of 49 U.S.C. Ch. 601 (relating to safety), the Hazardous Liquid Pipeline Safety Act of 1979 (Public Law 96-129, 93 Stat. 989), the Pipeline Safety Improvement Act of 2002 (Public Law 107-355, 116 Stat. 2985) and the regulations promulgated under the acts." 58 P.S. Section 801.102. They are concerned generally with providing "adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation. *See*, 49 U.S.C. Section 60102(a)(1). The federal pipeline safety laws are not concerned with any of the issues raised by Ms. Reid in her Formal Complaint, including:

a. Whether a master meter system is billing homeowners for gas usage according to rates established and published by the Commission.
b. Whether a master meter system has allegedly charged an individual for more units of gas used than the master meter read for the entire system.
c. Whether a master meter system offers budget billing or payment plans.
d. Whether a landlord who operates a master meter system credits payments first to rent or gas bills.

The claims brought by and the additional relief sought by Ms. Reid in her complaint are, therefore, outside the Commission's jurisdiction and duties under the Pipelines Act and Ms. Reid's complaint should have been dismissed on Mill Creek Management's preliminary objections..

In deciding not to sustain Mill Creek Management's preliminary objections, the Presiding Officer avoided the question of the Commission's lack of jurisdiction by focusing instead upon the Commission's decision in *Carlock* and Ms. Reid's legal conclusions in her complaint that Mill Creek Management was "operating illegally as a utility/distribution company" and that Mill Creek Management was violating the Public Utility Code. Order Denying Preliminary Objections, page 5 The Presiding Officer's reliance on *Carlock*, however, is misplaced.

It is well-established that Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). As a result, in ruling upon preliminary objections, the Commission must accept as true all well-pleaded material facts of the nonmoving party, as well as every reasonable 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, however, need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stone & Edwards Insurance Agency v. Commonwealth, Department of Insurance*, 616 A.2d 1060, 1063 (Pa.Cmwlth. 1992).

The Commission's Opinion and Order in *Robinson v. Shrewsbury Borough Municipal Authority,* Docket No. C-2011-2238127 (Order entered October 14, 2011), is instructive. In *Robinson,* the Presiding Officer had granted the Authority's preliminary objections on the basis of lack of jurisdiction – agreeing with the Authority that the Commission "does not have jurisdiction over the rates or services of a municipal authority" and that "the courts of common pleas have exclusive authority to regulate the rates and service of municipal authorities." *Robinson,* pages 3, 6. The Commission, on exceptions filed by the complainant to the Presiding Officer's initial decision, disagreed.

The Commission initially touched upon the complainant's status as *pro se* when he filed his complaint. *Robinson,* page 8. Under *Carlock,* the Commission explained, it will not in the normal course dismiss a *pro se* complaint "without first providing a hearing during which the *pro se* complainant could further explain his or her position and the factual basis for the complaint." *Id.* The Commission recognized, however, that the *Carlock* rule was not absolute. As the Commission stated: "There are some cases where we find that a hearing would not enable the Complainant to better explain his position or provide additional facts that would alter the inevitable conclusion that this Commission lacks jurisdiction to enter the Complaint in the first instance." *Robinson,* page 9 (*citing Vata v. Philadelphia Gas Works,* Docket No. C-2009-2149960 (Order entered August 24, 2010)).

Looking at the facts averred in Mr. Robinson's complaint, the Commission disagreed with the Presiding Officer and found that "it is not an inevitable conclusion that the Commission lacks jurisdiction to entertain the Complaint." *Robinson,* page 9. In reaching that determination, the Commission looked at the specific *factual* averments Complainant made in his complaint. *Robinson,* page 10. The Commission then found that, "[a]ccepting these averments as true, we cannot say with certainty that no relief is possible." *Id.*

The Commission's Opinion in *Robinson* points out the problem with the Presiding Officer's decision here. Rather than looking at the factual allegations contained in Ms. Reid's complaint, the Presiding Officer credited Ms. Reid's legal conclusions that Mill Creek Management was violating the Public Utility Code and that Mill Creek Management was operating illegally as a utility company. In ruling upon preliminary objections, however, the Commission should not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *See, Stone & Edwards Insurance Agency,* 616 A.2d at 1063.

A "public utility" is defined under the Public Utility Code as "[a]ny person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for [p]roducing, generating, transmitting, distributing or furnishing natural or artificial gas . . . to or for the public for compensation." 66 Pa.C.S. Section 102. In *Drexelbrook Associates v. Public Utility Commission,* 418 Pa. 430, 212 A.2d 237 (1965), the Court held that the owner of an apartment complex, which included 90 buildings containing 1,223 residential units, 9 retail stores, various public areas, and a club with a dining room, swimming pool, skating rink, and tennis courts, was not a "public utility" after it purchased the equipment used to furnish gas, water, and electric service directly to the tenants of the complex because the end users of the gas,

water, and electric service were part of a defined and discrete group – the tenants of the apartment complex. *Drexelbrook,* 212 A.2d at 241. Since the gas, water, and electric service in the apartment complex was to a defined and discrete group, it was not "to or for the public" within the meaning of the definition of a "public utility." *Drexelbrook,* 212 A.2d at 241.

Similarly, in *Pilot Travel Centers LLC v. Pennsylvania Public Utility Commission,* 933 A.2d 123 (Pa.Cmwlth. 2007), Commonwealth Court reiterated that "the test for determining whether utility services are being offered 'for the public' [is] . . . whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals. . . . The private or public character of a business does not depend upon the number of persons who actually use the service; rather, the proper characterization rests upon whether or not the service is available to all members of the public who may require the service." (*quoting Waltman v. Pennsylvania Public Utility Commission,* 596 A.2d 1221, 1223 (Pa.Cmwlth. 1991)) *See also, Petition of the Township of Mahoning for a Declaratory Order that the Provision of Water and Wastewater Service to Isolated Customers Adjoining its Boundaries Does Not Constitute the Provision of Public Utility Service Under 66 Pa.C.S. Section 102,* 2017 Pa.PUC LEXIS 160 (2017).

Given the Commission's limited jurisdiction over pipeline operators and the absence of factual allegations in Ms. Reid's complaint supporting her legal conclusions against Mill Creek Management, this is clearly one of the cases envisioned by the Commission in *Robinson* and *Newman v. Philadelphia Gas Works,* Docket No. C-2011-2273565 (Order entered March 29, 2012), where the Commission explained that the rule in *Carlock* was not absolute and that there are cases where a hearing is not necessary. Ms. Reid has done an excellent job in her complaint

explaining her position and airing her grievances against Mill Creek Management. There are, however, no additional facts that will alter the inevitable conclusion that the Commission lacks jurisdiction to entertain her complaint in the first instance. Mill Creek Management is a registered pipeline operator and the Commission only has jurisdiction over Mill Creek Management to enforce the federal pipeline safety laws. *See,* 58 P.S. Section 801.504(a). It does not have jurisdiction over Mill Creek Management as a public utility with respect to the rates Mill Creek Management charges its customers. *See, id.*

In her complaint, Ms. Reid simply does not allege or even imply that Mill Creek Management is providing natural gas service to the public for compensation. Moreover, there are no facts from which the Commission can reasonably (or even unreasonably) infer that Mill Creek Management is providing natural gas service to the public for compensation. Rather, the allegations in Ms. Reid's complaint all concern Mill Creek Management's operation of its master meter service in the Mill Creek MHP. Ms. Reid alleges in Section 4 that Mill Creek Management is "charging 173 homeowners excessive rates for usage." Complaint, page 2. She then alleges in Section 5 that Mill Creek Management is charging her "for more units [of natural gas] . . . than the master meter read for the entire MHP of 173 homes." Complaint, page 3. Nowhere does Ms. Reid allege, however, that Mill Creek Management is providing natural gas service to anyone outside the Mill Creek MHP. As a result, reading Ms. Reid's complaint as expansively as possible and giving her every benefit of every doubt, there is no way for the Commission to find that she has alleged or implied Mill Creek Management is operating as a "public utility" as that term is defined in Section 102 of the Public Utility Code.

The Commission does not blindly follow the *Carlock* rule for all *pro se* complainants and ignore the critical distinction between factual allegations and legal conclusions. *See, e.g.,*

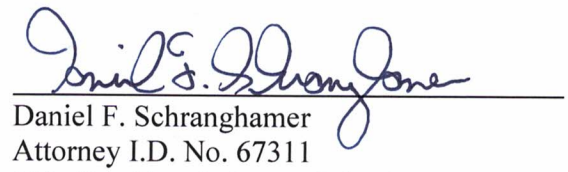
Newman, supra. That would otherwise lead to some truly remarkable results. If Ms. Reid had alleged, for example, that Home Depot was operating illegally as a utility/distribution company and violating the Public Utility Code because it had a Blue Rhino (the backyard grill propane tank exchange business) exchange at its stores, the *Carlock* rule would require the Commission to hold a hearing. That is the reason why the Commission should recognize the difference between factual allegations in a complaint that a complainant should be allowed to explain in more detail at a hearing and legal conclusions, unwarranted inferences, argumentative allegations, and opinions that do not merit a hearing.

D. Conclusion.

While unrepresented complainants should generally be allowed to testify about underlying facts, the question of whether Mill Creek Management is a "public utility" for purposes of Section of 102 of the Public Utility Code is a matter of law, not a question of fact. Allowing Ms. Reid to expand on the facts of her complaints against Mill Creek Management at a hearing will do nothing to change the conclusion that Mill Creek Management is not, as a matter of law, a public utility. Allowing Ms. Reid to expand on the facts of her complaints against Mill Creek Management at a hearing will do nothing to change the conclusion that those complaints are not related to the federal pipeline safety laws. Mill Creek Management, therefore, respectfully requests that the Commission grant this request for interlocutory review and direct the Presiding Officer to sustain Mill Creek Management's preliminary objections on this basis.

Respectfully submitted,

GSP Management Co.



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Date: August 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of Section 1.54 (relating to service by a party. The document was filed electronically on the Commission's electronic filing system.

Name:	**Means of Service:**	**Date(s) of Service:**
Debra Reid 2 Shawna Ave. York, PA 17402	First Class Mail	August 30, 2019
Andrew M. Calvelli, Administrative Law Judge Pennsylvania Public Utility Commission P.O. Box 3265 Harrisburg, PA 17105-3265	First Class Mail	August 30, 2019

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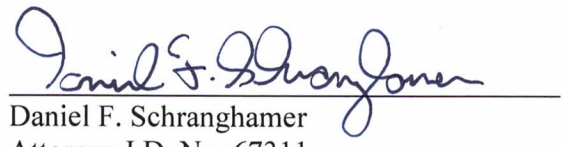

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