

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Suzanne Kohrs	:	
	:	C-2018-3006013
v.	:	
	:	C-2018-3006421
PPL Electric Utilities Corporation	:	

**INITIAL DECISION GRANTING
MOTION FOR JUDGMENT ON THE PLEADINGS**

Before
Benjamin J. Myers
Administrative Law Judge

INTRODUCTION

A customer filed two complaints against an electric utility relating to the utility's use of a right-of-way in conjunction with a power pole replacement project. For the reasons discussed below, both complaints will be dismissed for lack of subject matter jurisdiction.

HISTORY OF THE PROCEEDINGS

On November 9, 2018, Suzanne Kohrs (Complainant) filed a complaint with the Pennsylvania Public Utility Commission (Commission) against PPL Electric Utilities Corporation (PPL or Respondent) relating to a pole replacement project and sought the removal of a concrete erection pad, restoration of an area of ground and the removal of a stone access road in or near a utility right-of-way on the Complainant's property. The Complainant also alleged that PPL had violated a one-time roadway use agreement. The Complainant requested

reimbursement for a gate she installed as well as attorney fees.¹ At the time this complaint was filed it was assigned to Docket No. C-2018-3006013.

On November 30, 2018, the Complainant filed a second complaint with the Commission against PPL. In this complaint, the Complainant provided additional information relating to a 2015 power pole construction project and PPL's use of the right-of-way associated with the power pole. In this second complaint, the Complainant indicated that it contained two key aspects: 1) that PPL was obligated to restore a portion of land to its pre-construction condition from a previous project; and 2) that once restored, the construction project would not require the use of land which exceeds the bounds of a right-of-way.

In this complaint, the Complainant further argued: 1) that PPL is operating under the assumption that it has the right of a piece of private land; and 2) that PPL project 2016-2681-002 was wrongfully using land outside the bounds of the right-of-way. At the time this complaint was filed it was assigned to Docket No. C-2018-3006421.

On December 4, 2018, PPL filed an answer to the complaint in Docket No. C-2018-3006013. PPL admitted or denied the various allegations in the complaint. PPL indicated that the access road Complainant referenced would be removed as part of the restoration phase of the construction project but denied that it was required to remove the concrete erection pad.

On December 11, 2018, a notice was issued scheduling an initial telephonic hearing in Docket No. C-2018-3006013 on January 23, 2019. On December 12, 2018, a prehearing order was issued addressing, inter alia, requests for continuance, subpoena procedures, attorney representation and the Commission's policy encouraging settlements.

¹ While the Complainant's consolidated complaints will be dismissed for lack of subject matter jurisdiction by the Commission over rights-of-way, it should also be noted that some of the relief which the Complainant has requested – reimbursement for a gate and attorney fees – are forms of relief which the Commission also has no authority to award.

On December 27, 2018, PPL filed a motion for consolidation of the two dockets at Docket No. C-2018-3006013 and Docket No. C-2018-3006421 and attached a copy of both the complaints to its motion.

On December 28, 2018, a notice was issued scheduling an initial telephonic hearing in Docket No. C-2018-3006421 on February 6, 2019.

On January 4, 2019, an order was issued consolidating Docket No. C-2018-3006013 and Docket No. C-2018-3006421.² Both dockets were thereafter scheduled for an initial telephonic hearing on February 6, 2019.

At the request of the parties, this matter was continued on several occasions. The first telephonic hearing occurred on June 5, 2019 at which time both parties, as well as their counsel, participated. Attorney Lee Krause appeared on the behalf of Complainant and Attorney Graig Schultz appeared on the behalf of PPL. After an opportunity to discuss settlement, the parties indicated that they believed a settlement could be reached and wished to have additional time to discuss and reach a resolution. It was agreed that the parties could utilize an additional 10 to 14 days to work on a settlement and in the meantime the hearing would be rescheduled for a later date.

This matter was scheduled for a second telephonic hearing on August 2, 2019. Both parties again participated in the hearing. Attorney Lee Krause appeared on the behalf of Complainant and Attorney Kimberly Krupka appeared on the behalf of PPL. The parties indicated that they had been unable to reach a complete settlement but agreed to hold additional discussions at that time in an attempt to resolve any outstanding points preventing settlement. After additional discussions, the parties were unable to reach a settlement. PPL indicated that it intended to file a motion with respect to certain jurisdictional issues. Both parties requested that the hearing be continued until such time that PPL could file its motion and the Complainant could file a response and a ruling on the motion could be made.

² It could be argued that while the Complainant filed two separate complaints with the Commission, the second could reasonably have been viewed as an amended complaint rather than receiving a second docket number.

On August 6, 2019, a notice was issued scheduling a further telephonic hearing for October 16, 2019, to give the parties time to file a motion and a response and to have the motion ruled on before any additional hearing was held.

On August 7, 2019, PPL filed a motion for judgment on the pleadings seeking a dismissal of the complaint for lack of Commission jurisdiction as well as a brief in support of said motion. This motion included a notice to the Complainant that a response to the motion was due within 20 days of service of the motion. The Complainant never filed a response to PPL's motion. This motion is now ready for disposition. The record in this matter closed on August 30, 2019, the date by which Complainant's response to the motion was due. For the reasons discussed below, PPL's motion for judgment on the pleadings will be granted and the consolidated complaints in this matter will be dismissed for lack of Commission jurisdiction.

FINDINGS OF FACT

1. The Complainant in this matter is Suzanne Kohrs.
2. The Respondent in this matter is PPL Electric Utilities Corporation.
3. On November 9, 2018, the Complainant filed a complaint against the Respondent which was docketed at Docket No. C-2018-3006013.
4. On November 30, 2018, the Complainant filed a second complaint against the Respondent which was docketed at Docket No. C-2018-3006421.
5. On December 4, 2018, Respondent filed an answer to the complaint in Docket No. C-2018-3006013.
6. On December 27, 2018, PPL filed a motion for consolidation of the two dockets at Docket No. C-2018-3006013 and Docket No. C-2018-3006421 and attached a copy of both the complaints to its motion.

7. On January 4, 2019, an order was issued consolidating Docket No. C-2018-3006013 and Docket No. C-2018-3006421.

8. On August 7, 2019, Respondent filed a motion for judgment on the pleadings seeking a dismissal of the complaint for lack of Commission jurisdiction as well as a brief in support of said motion.

9. This motion included a notice to the Complainant that a response to the motion was due within 20 days of service of the motion.

10. The Complainant never filed a response to Respondent's motion.

11. The only averments made in the complaints filed in this matter relate to the scope and validity of an existing right-of-way on the Complainant's property and the Complainant's allegations that Respondent has exceeded the boundaries of said right-of-way.

12. The relief requested by the Complainant includes a payment of damages and attorney fees by the Respondent.

DISCUSSION

Sections 5.102(a) and (d)(1) of the Commission's regulations, 52 Pa. Code §§ 5.102(a) and (d)(1), provide for motions for judgment on the pleadings, as follows:

(a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

(d) *Decisions on motions.*

(1) *Standard for grant or denial on all counts.* The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The

judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law.

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 or of any regulation or order of the Commission. 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. 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).

Respondent asserts that the averments of the complaint and the relief sought by the Complainant only relate to issues of the scope and validity of a right of way and therefore the Commission has no subject matter jurisdiction over the complaints or the relief sought. This assertion is correct and well-supported by relevant case law.

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. 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 must view the record in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. First Mortgage Co. of Pennsylvania v. McCall, 459 A.2d 406 (Pa.Super.1983); Mertz v. Lakatos, 381 A.2d 497 (Pa.Cmwlth. 1976). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Thomson Coal Company v. Pike Coal Company, 412 A.2d

466 (Pa. 1979). Judgment will be granted only where the right to relief is clear and free from doubt. Viewing the complaints in this case in a light most favorable to the Complainant, the Complainant's allegations relate solely to the scope and validity of a right-of-way and whether PPL has acted within its limits. As stated in the complaints, "The deed and right-of-way agreement will corroborate that the private access road is not included"; "PPL desires to overreach the right-of-way and will unnecessarily damage the land in question"; and that PPL is "wrongfully using lands outside the bounds of the right-of-way."

To summarize her complaint, the Complainant asserted that it contained two key aspects: 1) that PPL was obligated to restore a portion of land to its pre-construction condition from a previous project; and 2) that once restored, the construction project would not require the use of land which exceeds the bounds of a right-of-way. In the second complaint, Complainant reiterated: 1) that PPL is operating under the assumption that it has the right of a piece of private land; and 2) that PPL project 2016-2681-002 was wrongfully using land outside the bounds of the right-of-way.

Complainant was represented by counsel throughout the course of this matter. Despite PPL filing its motion to dismiss and providing a notice to plead, Complainant did not file a response to this motion. Section 5.102(d)(1) of the Commission's regulations provides that when such a motion has been filed, the judgment sought will be rendered if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. Here, the only facts at issue between the parties relate directly to the scope and validity of a right-of-way and PPL's use, or abuse of it, during a power pole replacement project.³

³ The Commission also lacks subject matter jurisdiction over the placement, location and removal of power poles and wires. These matters are in the nature of civil actions in trespass and/or ejection. The Public Utility Code does not confer the Commission with authority to decide such matters. Those issues involve the proper use of real property and are within the exclusive jurisdiction of a Courts of Common Pleas. Because the Commission lacks that jurisdiction, a complaint raising such issues must be dismissed for lack of subject matter jurisdiction. Amati v. West Penn Power Company, Docket No. C-00945482 (Order entered October 25, 1995); Lee Ann Van Grootenbruel v. The United Telephone Company of Pennsylvania, Docket No. C-00992710 (Initial Decision dated January 4, 2000); Designer Homes, Inc. v. Pa. Power & Light Company, Docket No. C-932892 (May 18, 1993) 1993 Pa. PUC LEXIS 30.

The Commission lacks subject matter jurisdiction over such issues as described above. The Respondent is entitled to a judgment as a matter of law. Complainant's consolidated complaints will therefore be dismissed.

CONCLUSIONS OF LAW

1. 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. 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).

2. 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).

3. 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).

4. The Complainant's consolidated complaints allege and seek relief of matters relating to the scope and validity of an easement over which the Commission has no subject matter jurisdiction. Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985).

5. A motion for judgment on the pleadings will be granted if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

6. There are no genuine issues as to a material fact and the Respondent as the moving party is entitled to a judgment as a matter of law. 52 Pa. Code § 5.102(d)(1).

