

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Paul W. Memminger	:	
	:	
v.	:	C-2020-3015313
	:	
PECO Energy Company	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision sustains the Preliminary Objection of PECO Energy Company (PECO) to the formal Complaint filed by Paul W. Memminger (Complainant) and dismisses the Complaint on the basis of lack of subject matter jurisdiction.

HISTORY OF THE PROCEEDING

On December 31, 2019, Mr. Memminger filed a formal Complaint against PECO alleging that PECO had run an electric service line across his property to another service address. Mr. Memminger asked that the Pennsylvania Public Utility Commission (Commission) order PECO to remove the line from his property.

On January 27, 2020, PECO filed both an Answer and a Preliminary Objection to the Complaint, the latter duly endorsed with a Notice to Plead. In its Answer, PECO denied any wrongdoing and argued that as the Complaint is a property dispute, the matter is outside of the jurisdiction of the Commission. PECO reiterated its legal argument in its Preliminary Objection

asking that the Complaint be dismissed for legal insufficiency under the Commission's regulation at 52 Pa. Code § 5.101(a)(4).

No response to the Preliminary Objection was filed by Complainant.

On February 19, 2020, an initial hearing Notice was sent to the parties setting April 16, 2020 as the date for an in-person hearing at the Harrisburg, Pennsylvania office of the Commission. On February 28, 2020, a revised hearing Notice was issued changing the type of hearing on April 16, 2020 to a telephonic hearing.

On April 16, 2020, a telephonic hearing in the nature of a prehearing conference convened. Edward Fisher, Esquire, appeared on behalf of PECO. Mr. Memminger appeared on behalf of himself. This conference was an off-the-record proceeding as only matters of a procedural nature were addressed, principally a query to Complainant as to whether he wished to Answer the Preliminary Objections and an explanation of the administrative complaint process including the issuance of an Initial Decision and the Exception stage.

The record closed on April 16, 2020 following the prehearing conference. PECO's Preliminary Objection is ready for resolution.

FINDINGS OF FACT

1. Complainant is Paul W. Memminger who resides at 121 Kiltie Drive, New Hope, Pennsylvania.

2. Respondent is PECO Energy Company, a jurisdictional public utility providing residential electric distribution service in the Commonwealth of Pennsylvania.

3. On December 31, 2019, Mr. Memminger filed a formal Complaint against PECO alleging that PECO had run an electric service line across his property to another service address and asking that PECO be ordered to move the wire.

4. On January 27, 2020, PECO filed both an Answer and a Preliminary Objection to the Complaint, the latter duly endorsed with a Notice to Plead.

5. No response to the Preliminary Objection was filed by Complainant.

6. On April 16, 2020, a telephonic hearing in the nature of a prehearing conference convened and both parties were present.

DISCUSSION

The Commission's Rules of Administrative Practice and Procedure permit the filing of Preliminary Objections:

§ 5.101. Preliminary objections.

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(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.

52 Pa. Code § 5.101(a).

Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

In deciding preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. *Dep't of Auditor General v. State Employees' Retirement System*, 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa.Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees' Retirement Bd.*, 690 A.2d 1312 (Pa.Cmwlth. 1997).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly as contained in the Public Utility Code. Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993).

The essence of this matter is Complainant's contention that PECO has impermissibly run an electric service line across his property to serve another service address. In his Complaint, Complainant stated that, "PECO installed a wire across my property to an adjacent property . . . I continue to maintain that the wire crosses my property at approximately 23 feet from the [property survey] monument." See, Attachment I to the Complaint. Complainant asks that the Commission order PECO to remove the line from his property.

I presume that the facts in the Complaint are true, and PECO has not alleged any contrary facts that would warrant an evidentiary hearing. On that basis, I must agree with PECO that this is a property rights dispute over which the Commission has no jurisdiction. As PECO correctly states in its Preliminary Objection, the Commission has determined that it is not the

proper forum for adjudicating property rights disputes. Preliminary Objection at 5, ¶ 22, citing *Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (Order entered July 3, 2003); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Order entered September 15, 1999). Thus, PECO is also correct that the Complaint is legally insufficient. 52 Pa. Code § 5.101(a)(4). This does not mean that Complainant is, “out of court,” in that he may take this matter up with a court that has jurisdiction to hear his case. The Commission is simply not the proper forum.

For the foregoing reasons, PECO’s Preliminary Objection is sustained, and the Complaint is dismissed.

CONCLUSIONS OF LAW

1. Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, PUC Docket No. C-000935435 (July 18, 1994).

2. When considering the preliminary objection, the Commission must determine “whether the law says with certainty, based on well-pleaded factual averments . . . that no recovery or relief is possible. *P. J. S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa.Cmwlth. 1996). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002); *Dept. of Auditor General v. State Employees’ Retirement System*, 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003).

3. Preliminary objections are available to parties and may be granted where there is a lack of Commission jurisdiction. 52 Pa.Code § 5.101(a)(1).

4. The Complaint must set forth an act done or omitted to be done by the utility company in violation of any law which the Commission has jurisdiction to administer. 66 Pa. C.S. § 701; 52 Pa. Code § 5.21(a).

