

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nancy Poekert	:	
	:	
v.	:	C-2021-3025084
	:	
AmeriGas Propane, LP	:	

INITIAL DECISION

Before
Darlene Heep
Administrative Law Judge

INTRODUCTION

This decision sustains the Preliminary Objection of AmeriGas Propane, LP (AmeriGas) and dismisses the Complaint because the Commission does not have jurisdiction over private propane distribution contracts and cannot award monetary damages.

HISTORY OF THE PROCEEDING

On March 9, 2021, the Complainant, Nancy Poekert, filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against AmeriGas Propane, LP (AmeriGas). The Complaint avers that AmeriGas did not fulfill its promises regarding propane delivery to the Complainant. As relief, the Complainant would like the Commission to monitor the provision of service of AmeriGas with regard to Pennsylvania customers and provide compensation for any costs involved in changing to another propane provider.

On May 26, 2021, an Initial Telephonic Hearing Notice was issued, setting a hearing in this matter for June 29, 2021. Also on May 26, 2021, a Prehearing Order was issued, setting forth procedures and guidelines, including how to request a continuance.

On June 28, 2021, a Notice of Appearance for AmeriGas was filed by Alexander Harris, Esq.

The hearing convened as scheduled on June 29, 2021. Counsel for AmeriGas questioned whether the Commission had jurisdiction over this matter. The Complainant stated that she would prefer that the jurisdiction issue be resolved rather than go forward with the hearing. Given that an Answer was not filed, Mr. Harris was directed to file either an Answer or a dispositive pleading by July 19, 2021, and the hearing was adjourned. An order was issued on June 29, 2021, formalizing the July 19, 2021 deadline.

Also on June 29, 2021, a Cancelled/Rescheduled Initial Call-In Telephonic Hearing Notice was issued, setting a telephonic hearing for September 15, 2021. A Prehearing Order for the September 15, 2021 hearing was issued on June 30, 2021.

In compliance with the June 29, 2021 Order, on July 19, 2021, Preliminary Objections were filed on behalf of AmeriGas. A copy was electronically served upon the Complainant. The Preliminary Objections included a Notice to Plead stating that a written response was due by August 5, 2021.

In an email to the Legal Assistant dated July 19, 2021, the Complainant acknowledged receipt of the Preliminary Objections, requested assistance in responding to the Preliminary Objection and instructions on how to request a continuance and stated that she was on extended vacation. The Legal Assistant referred the Complainant to 52 Pa. Code § 5.61(a)(2), which provides that answers to preliminary objections must be filed within 10 days of the date of service.

The Complainant did not file a response to the Preliminary Objections. The record was closed on August 5, 2021, the due date for the Complainant's response to the Preliminary Objections.

Respondent's Preliminary Objections are procedurally ready for disposition. For the reasons discussed below, the Preliminary Objections will be sustained, and the Complaint will be dismissed.

FINDINGS OF FACT

1. The Complainant is Nancy Poekert.
2. The Respondent is AmeriGas Propane, LP.
3. On March 9, 2021, the Complainant filed a Complaint alleging that AmeriGas did not fulfill its promises regarding propane delivery.
4. As relief, the Complainant would like the Commission to monitor the provision of service of AmeriGas with regard to Pennsylvania customers and provide compensation for any costs involved in changing to another propane provider.
5. The Respondent did not file an Answer to the Complaint.
6. On July 19, 2021, the Respondent filed Preliminary Objections asserting that the Commission has no jurisdiction regarding propane service contracts.
7. The Complainant did not file a response to the Preliminary Objections.

DISCUSSION

The Commission's Rules of Administrative Practice and Procedure provide for the filing of preliminary objections. The Commission's Rules at 52 Pa. Code § 5.101(a) limit preliminary objections to the following grounds:

- (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 Transp. Interveners v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Phila. Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. *Montague v. Phila. Elec. Co.*, 66 Pa. PUC 24 (1988).

The moving party may not rely on its own factual assertions but must accept, for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. *Raynor v. D'Annunzio*, 243 A.3d 41 (Pa. 2020); *County of Allegheny v. Commonwealth*, 490 A.2d 402 (Pa. 1985). Therefore, in ruling on a preliminary objection, the Commission must assume that the factual allegations of the Complaint are true. *Id.* Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Commonwealth v. UPMC*, 652 Pa. 322, 208 A.3d 898 (Pa. 2019); *Dep't of Auditor General v. State Emps. Retirement Sys.*, 836 A.2d 1053 (Pa.Cmwlth. 2003) (*citing, Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002)).

Here, AmeriGas has filed Preliminary Objections on the grounds of 52 Pa. Code § 5.101(a)(1), asserting that the Commission does not have jurisdiction over a contractual dispute concerning its propane distribution services. AmeriGas also asserts that the

Commission does not have the authority to award the monetary damages sought by the Complainant. The Complainant did not file a response to the Preliminary Objections.

The Complaint concerns propane delivery services for which the Complainant contracted with the Respondent. The Complainant asserts that the Respondent did not fulfill its promises regarding how much propane was to be delivered and when. She also seeks compensation for any costs incurred when changing to a new propane provider, or damages.

AmeriGas Propane asserts that it is not a public utility and that the Commission's jurisdiction over AmeriGas Propane extends only to AmeriGas Propane's pipeline operations under the Gas and Hazardous Liquids Pipelines Act. P.L. 856, No. 127 (the "Pipeline Act"). AmeriGas further asserts that the Commission does not have jurisdiction over private complaints against pipeline operators such as AmeriGas Propane, and therefore Ms. Poekert's Complaint should be dismissed.

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 ("Code"). *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). 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. den.*, 637 A.2d 293 (Pa. 1993).

Section 701 of the Code provides that,

The commission, or any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, 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. . . .

66 Pa.C.S § 701 (emphasis added).

Section 102 of the Code defines the term “public utility” as:

- (1)** Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
 - (i)** Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.
 - (ii)** Diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation.
 - (iii)** Transporting passengers or property as a common carrier.
 - (iv)** Use as a canal, turnpike, tunnel, bridge, wharf, and the like for the public for compensation.
 - (v)** Transporting or conveying natural or artificial gas, crude oil, gasoline, or petroleum products, materials for refrigeration, or oxygen or nitrogen, or other fluid substance, by pipeline or conduit, for the public for compensation.
 - (vi)** Conveying or transmitting messages or communications, except as set forth in paragraph (2)(iv), by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.
 - (vii)** Wastewater collection, treatment, or disposal for the public for compensation.
 - (viii)** Providing limousine service in a county of the second class pursuant to Subchapter B of Chapter 11 (relating to limousine service in counties of the second class).

66 Pa.C.S § 102 “Public Utility” (footnote omitted). This section further provides that the term “public utility” does not include “[a]ny producer of natural gas not engaged in distributing such gas directly to the public for compensation.” 66 Pa.C.S § 102 “Public Utility” (2)(iii).

At issue here is the fulfillment of a private contract between the Complainant and AmeriGas. While the pipeline operations of the Respondent may fall under the jurisdiction of the Commission, contracted delivery of propane services are not a public utility as defined by 66 Pa.C.S § 102 and therefore are not within the jurisdiction of the Commission. As the

Commission has stated, "[e]ntities that are in the business of selling propane and delivery of propane to individual tanks located on the customers' property are not considered public utilities subject to Commission jurisdiction under section 102 of the Public Utility Code, 66 Pa. C.S. § 102." *Application of PPL Gas Utilities Corporation for approval of the abandonment or discontinuance of utility propane sale service*, Docket Number A-122050F2003 (Order entered January 26, 2007) at 7.

Further, the Complainant here is claiming that the Respondent has violated its delivery contract and is seeking damages in the form of any expenses she may incur when switching to a different propane provider. Complaint at 3. As held in *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. Super. 1978), "[t]he PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility."

Also, it is well-established under Pennsylvania law that the enforcement powers of the Commission do not include the power to award money damages. *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978). The Commission cannot award the reimbursement sought by the Complainant here. *See Morrow v. Bell Tel. Co. of Pa.*, 330 Pa.Super. 276, 479 A.2d 548 (1984); *W. Penn Power Co. v. Pa. Pub. Util. Comm'n*, 104 Pa.Cmwlth. 21, 521 A.2d 75 (1987); *Ostrov v. I.F.T., Inc.*, 402 Pa.Super. 87, 586 A.2d 409 (1991). A request for monetary damages must be pursued before a Magisterial District Justice or a Court of Common Pleas. Therefore, the Preliminary Objection will be sustained for lack of jurisdiction. *See Poorbaugh v. Pa. Pub. Util. Comm'n*, 666 A. 2d 744 (Pa. Cmwlth. 1995).

Accordingly, the Preliminary Objections are sustained, and the Complaint is 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. Pa. Elec. Co.*, Docket No. C-20066937 (Opinion and Order entered May 28, 2008).

2. A preliminary objection seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979);

3. A Complaint filed with the Commission may concern 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. services. 66 Pa.C.S § 701; 66 Pa.C.S § 102; *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977); *Application of PPL Gas Utilities Corporation for approval of the abandonment or discontinuance of utility propane sale service*, Docket Number A-122050F2003 (Order entered January 26, 2007).

4. Propane distribution under a private contract does not fall within the definition of a "public utility" and does not pertain to any law under the Commission's jurisdiction to administer or any regulation or order of the Commission. 66 Pa.C.S § 102; *Application of PPL Gas Utilities Corporation for approval of the abandonment or discontinuance of utility propane sale service*, Docket Number A-122050F2003 (Order entered January 26, 2007).

5. The Commission does not have jurisdiction to decide the private contractual disputes between the Complainant and AmeriGas Propane, LP. *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. Super. 1978).

6. The Commission does not have the enforcement powers to award the Complainant the money damages or reimbursement sought in the Complaint. *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections of AmeriGas Propane, LP are sustained.
2. That the Complaint of Nancy Poekert against AmeriGas Propane, LP at Docket No. C-2021-3025084 is dismissed.
3. That the Secretary shall mark this docket closed.

Date: September 17, 2021

_____/s/
Darlene Heep
Administrative Law Judge