



Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

TEL: 412 566 6000
FAX: 412 566 6099

Lauren M. Burge
412.566.2146
lburge@eckertseamans.com

January 12, 2022

Via Electronic Filing

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

Re: John Kerr Musgrave, IV v. Pittsburgh Water and Sewer Authority
Docket No. C-2020-3020714

Dear Secretary Chiavetta:

Enclosed for electronic filing please find The Pittsburgh Water and Sewer Authority's ("PWSA") Motion to Dismiss with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

/s/ Lauren M. Burge

Lauren M. Burge

Enclosure

Cc: Cert. of Service w/enc.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John Kerr Musgrave, IV,	:
Complainant,	:
	:
v.	: Docket No. C-2020-3020714
	:
The Pittsburgh Water and Sewer Authority,	:
Respondent.	:
	:

NOTICE TO PLEAD

To: John Kerr Musgrave, IV
6059 Bunkerhill Street
Pittsburgh, PA 15206

You are hereby notified that a reply to the enclosed **Motion to Dismiss** of The Pittsburgh Water and Sewer Authority (“Authority”) must be filed within 20 days of the date of service.

All pleadings, such as a response to a Motion to Dismiss, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for the Authority and where applicable, the Administrative Law Judge presiding over the issue.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Karen O. Moury, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
kmoury@eckertseamans.com

Lauren M. Burge, Esquire
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
lburge@eckertseamans.com

/s/ Lauren M. Burge

Lauren M. Burge, Esquire

Date: January 12, 2022

Counsel for
The Pittsburgh Water and Sewer Authority

**BEFORE THE
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	:	

**THE PITTSBURGH WATER AND SEWER AUTHORITY’S
MOTION TO DISMISS FORMAL COMPLAINT**

Pursuant to 52 Pa. Code § 5.103 and the Interim Order Directing Parties to File Amended Pleadings issued on December 3, 2021 in the above-referenced proceeding, The Pittsburgh Water and Sewer Authority (“PWSA” or the “Authority”) submits this Motion to Dismiss the Amended Complaint of John Kerr Musgrave, IV (“Motion”).¹ In the alternative, PWSA requests that this Motion be treated as Preliminary Objections and/or a Motion for Judgment on the Pleadings. In support of this Motion, PWSA avers as follows:

I. INTRODUCTION

Mr. Musgrave’s original Formal Complaint was served on PWSA on July 8, 2020. The original complaint raised concerns about water quality, and requested that PWSA build a new water service line to the subject property at 6059 Bunkerhill Street. On August 10, 2020, PWSA filed an Answer with New Matter and Preliminary Objections to the complaint, which PWSA incorporates herein by reference. In summary, however, PWSA explained that the water line at issue is a private, customer-owned service line that is not part of PWSA’s water distribution

¹ In the alternative, PWSA requests that the Administrative Law Judge treat this as a Motion for Summary Judgment pursuant to 52 Pa. Code § 5.102(a).

system. The subject property is on a private street and was served by a private party line that was shared with the Complainant's neighbors.

In November 2020, in an effort to resolve the quality of service concerns raised by the Complainant, PWSA replaced the private service line that served three properties on Bunkerhill Street, including the subject property.² This work was performed as part of PWSA's Lead Service Line Replacement ("LSLR") program, a Commission-approved program that allows PWSA to replace private water service lines under certain conditions, including when the private line is made of lead or galvanized steel, as was the case with the private service line here.

After the private line replacement was completed, the Complainant wished to observe his water service through the summer months to determine if he had any remaining quality of service concerns. In his Status Report filed on September 27, 2021, the Complainant stated that his concerns regarding water quality had, in fact, been resolved. As a result, the only remaining issues in his complaint related to the public versus private nature of the Complainant's service line and other property-related items.³

At a further prehearing conference that was held on December 2, 2021, however, the Complainant raised a variety of new issues related to the public versus private nature of the service line, property restoration issues, and requests for reimbursement. Pursuant to the December 3, 2021 Interim Order Directing Parties to File Amended Pleadings, the Complainant filed an Amended Complaint on December 22, 2021 incorporating these new issues, many of which were raised for the first time more than a year after the work on the private service line was completed.

² The shared private service line serves six properties in total, but three customers previously replaced their own service lines.

³ See also PWSA's Status Report filed on October 1, 2021.

PWSA is simultaneously filing an Answer with New Matter to the Amended Complaint, which is incorporated herein by referenced.

In his Amended Complaint, Mr. Musgrave requests that PWSA take ownership and maintenance responsibility for the private water service line serving the subject property; obtain a permanent easement through neighboring properties and absorb all associated costs; pave Bunkerhill Street, which is a private street; and construct a curb at the subject property. He also requests reimbursement for expenses related to plumbers and plumbing equipment, purchases of chlorine test kits and tablets, water testing services, bottled water, and ice.

As discussed more fully below, PWSA now files this Motion to Dismiss the Formal Complaint in its entirety based on: (1) the Commission's lack of subject matter jurisdiction to decide the public versus private nature of the water service line; and (2) the Complaint's legal insufficiency to show that the Complainant is entitled to the requested relief; (3) the Commission's lack of subject matter jurisdiction to decide private contractual disputes; and (4) the Commission's lack of jurisdiction to award monetary compensation or damages. For these reasons and those discussed in PWSA's Answer with New Matter, the Complaint must be dismissed.

II. MOTION

A. The Commission Lacks Subject Matter Jurisdiction to Decide the Public Versus Private Nature of the Service Line.⁴

1. To act on the Amended Complaint, the Commission must have jurisdiction.⁵ The Commission, as a creation of the General Assembly, has only the powers and authority granted

⁴ Questions of jurisdiction may be raised at any time. *See e.g. In re J.A.*, 107 A.3d 799, 801 (Pa. Super. 2015) ("Questions of jurisdiction can be raised sua sponte."); *see also Pilchesky v. Doherty*, 941 A.2d 95, 101 (Pa. Commw. Ct. 2008) ("Failure to join or serve parties is a jurisdictional defect, and may be raised by a court on its own motion at any time, even on appeal. Where the defect exists, dismissal is appropriate.").

⁵ *See* 52 Pa. Code §§ 5.101(a)(1); 5.102.

to it by the General Assembly contained in the Public Utility Code.⁶ The Commission must act within, and cannot exceed, its jurisdiction.⁷ Jurisdiction may not be conferred by the parties where none exists.⁸ Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy.⁹

2. The courts, not the Commission, must decide the public versus private nature of a disputed line. The courts have primary jurisdiction to adjudicate issues related to ownership and the dedication of property to the public use.¹⁰ No power is conferred upon the Commission under the Public Utility Code to adjudicate property disputes such as the one here.¹¹

3. In his Amended Complaint, Mr. Musgrave requests that PWSA take ownership and maintenance responsibility for the private service line at the subject property. However, the Commission lacks jurisdiction to determine the public versus private nature of the line, or to order PWSA to take ownership of the line.

4. Therefore, the Complainant's claims must be dismissed because the Commission lacks jurisdiction to decide the public versus private nature of the service line.

⁶ *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Opinion and Order (May 28, 2008); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

⁷ *City of Pittsburgh v. PUC*, 43 A.2d 348 (Pa.Super. 1945).

⁸ *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967).

⁹ *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992), *appeal denied*, 637 A.2d 293 (Pa. 1993).

¹⁰ Property disputes belong in a court of general jurisdiction. *See, e.g., Anne E. Perrige v. Metropolitan Edison Co.*, PUC Docket No. C-00004110, Order (July 11, 2003) (The Commission had no jurisdiction to interpret the meaning of a written right-of-way agreement.); *Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00945842, Order (October 25, 1995) (Real property issues such as trespass and whether utility facilities are located pursuant to valid easements are within the exclusive jurisdiction of the Courts of Common Pleas.); *Tod and Lisa Shedlosky v. Pennsylvania Electric Co.*, Docket No. PUC Docket No. C-20066937, Order (May 28, 2008).

¹¹ *Id.*; *see also Overlook Development Co. v. Public Service Commission*, 158 A. 869; *see also In re Water Distribution Mains*, 466 A.2d 239 (Pa.Cmwlth. 1983).

B. The Complaint Is Legally Insufficient.

5. The Amended Complaint is insufficient to show that the Complainant is entitled to the requested relief.

6. As the complainant, Mr. Musgrave must show that he is entitled to the requested relief.¹² As the party seeking relief, the complainant bears the burden proving (a) that PWSA is in violation of the Public Utility Code, the Commission's Regulations or the Commission's Order and (b) his right to the requested relief.¹³

7. Section 1501 of the Public Utility Code¹⁴ requires PWSA to furnish and maintain adequate, efficient, safe and reasonable service and facilities. That provision, however, does not require PWSA to bear all repair and maintenance responsibility for any and all water lines in the City, regardless of ownership.

8. Neither Section 1501 nor any other provision of the Public Utility Code empowers the Commission to direct PWSA to use public utility funds to benefit private individual(s) by repairing, maintaining or replacing a privately-owned water service line or a privately owned street.¹⁵

¹² See 52 Pa.Code § 5.101(a)(4), 5.102.

¹³ 66 Pa. C.S. § 332(a).

¹⁴ 66 Pa. C.S. § 1501.

¹⁵ 53 Pa. C.S. § 5612; *Price v. Philadelphia Parking Authority*, 221 A.2d 138 (Pa. 1966) (A public corporation, exercises public powers and its engagements are public in nature, and its facilities are public property. Empowered to act only for the public benefit, a public corporation may not employ its resources for the primary and paramount benefit of a private endeavor. An engagement essentially private in nature may not be justified on the theory that the public will be incidentally benefitted.)

9. PWSA’s Water Tariff provides that “[t]he customer service line shall be furnished, installed, maintained and/or replaced, when necessary, by and at the sole expense of the customer.”¹⁶

10. Additionally, PWSA is not responsible for the repair and maintenance of every water line in the City. As stated in the Authority’s Water Tariff, PWSA is only responsible for the repair and maintenance of water mains: (a) leased to the PWSA by the City under the Capital Lease Agreement effective July 27, 1995, as amended;¹⁷ (b) constructed by the City or the Authority for public use since July 27, 1995; and (c) dedicated to public use and accepted by the Authority on or after July 27, 1995.¹⁸ Responsibility for the repair and maintenance of water lines that do not fall within one of these categories lies with the constructing party and/or the owners of the property or properties served by such lines, not with PWSA. The private water line at issue here does not fall into one of these categories and therefore is not PWSA’s responsibility.

11. Accordingly, the Amended Complaint must be dismissed as being legally insufficient.

C. The Commission Lacks Subject Matter Jurisdiction to Decide Private Contractual Matters.

12. The Amended Complaint raises private contractual issues between the Complainant and PWSA relating to restoration work after the property received a private service

¹⁶ PWSA Tariff Water – Pa. P.U.C. No. 1, Part III, Section B.1.

¹⁷ PWSA is a party to 30-year lease with the City of Pittsburgh, and PWSA will only acquire the City’s assets upon termination of that lease in 2025. *See Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water And Sewer Authority*, Docket No. M-2018-2640802 (water) and M-2018-2640803 (wastewater), Final Implementation Order entered March 15, 2018, at 27.

¹⁸ PWSA Tariff Water – Pa. P.U.C. No 1 at Part II.3 (definition of “Authority Water Main”) (effective March 1, 2019).

line replacement. Under PWSA's LSLR program, the owner of the subject property, Judith Musgrave, signed a contract which stated that PWSA is not responsible for restoration work on private property, but the Complainant now claims that PWSA should be required to make additional repairs.

13. The Complainant also claims that his mother signed the temporary easement "under duress," and apparently seeks to claim after the fact that the temporary easement is invalid.

14. At their core, these claims are a private contractual dispute in which the customer is disputing the level of restoration work that PWSA is required to complete under the LSLR Agreement, and the validity of the Temporary Easement Agreement.

15. It is well established that the Commission lacks jurisdiction over private contractual disputes between a utility and its customers.¹⁹ Jurisdiction over such contractual disputes instead lies with the courts of common pleas.

16. Therefore, the Complainant's claims must be dismissed because such contractual disputes are beyond the Commission's jurisdiction.

D. The Commission Lacks Jurisdiction To Award Monetary Compensation or Damages.

17. The Complainant requests monetary compensation as reimbursement for the expenses related to plumbers and plumbing equipment, purchases of chlorine test kits and tablets, water testing services, bottled water, and ice.

¹⁹ See, e.g., *Odesa McCastle v. Philadelphia Gas Works*, PUC Docket No. F-2013-2345223, Final Order entered May 1, 2013, adopting Initial Decision dated Mar. 21, 2013; *Allport Water Authority et al. v. Winburne Water Co.*, 393 A.2d 673, 675 (Pa. Super. 1978) ("...the PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility."); *Leveto v. National Fuel Gas Dist. Corp.*, 366 A.2d 270 (Pa. Super. 1976) ("Since the case at bar involves a private contractual dispute between a citizen and a utility, the PUC is not jurisdictionally empowered to decide it.")

18. The Commission does not have jurisdiction to award damages or other monetary compensation. Claims for property damage and/or diminution of property values²⁰ are not determined by the Commission. The Commission's jurisdiction does not include actions that sound in either contract or tort. The powers of the Commission do not include the power to award monetary damages,²¹ such as damages to property.²² It is well settled that the courts of common pleas have jurisdiction over suits for property damage, including claims against public utilities.

19. Therefore, the Commission lacks jurisdiction to grant any monetary compensation or damages to the Complainant, and such issues and claims must be dismissed.

²⁰ The Commission has not been given authority under any other statute to assess damage to private property value caused by the activities of a public utility. *See Letter of Notification of Philadelphia Electric Company*, PUC Docket No. A-110550F055, Opinion and Order entered Mar. 26, 1993; 1993 Pa. PUC LEXIS 32 (determination of damages due to alleged decreases in market value is not within the Commission's jurisdiction to hear and determine.)

²¹ *See, e.g., DeFrancesco v. W. Pa. Water Co.*, 453 A.2d 595 (Pa. 1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell Telephone Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

²² The Commission possesses no jurisdiction over real property issues. *See, e.g., Leonard Kapel v. Peoples Natural Gas Company LLC*, PUC Docket No. C-2010-2153364, Final Order (Act 294) entered Oct. 6, 2011, adopting Initial Decision dated Aug. 12, 2011; *David E. Stefanoski v. Pennsylvania-American Water Company*, PUC Docket No. C-20078219, PUC Opinion and Order entered Sept. 22, 2008.

III. CONCLUSION

WHEREFORE, The Pittsburgh Water and Sewer Authority respectfully requests that the Commission (a) dismiss the Complaint; and, (b) grant any other relief deemed appropriate.

Respectfully submitted,

/s/ Lauren M. Burge

Karen O. Moury, Esquire (I.D. No. 36879)
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
(717) 237-6036 (phone)
(717) 237-6019 (fax)
kmoury@eckertseamans.com

Lauren M. Burge, Esquire (I.D. No. 311570)
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
(412) 566-2146 (phone)
(412) 566-6099 (fax)
lburge@eckertseamans.com

Date: January 12, 2022

Counsel for
The Pittsburgh Water and Sewer Authority

Verification

I, Julie A. Quigley, am the Director of Customer Service for The Pittsburgh Water and Sewer Authority (“PWSA” or “Authority”), and I hereby state that the facts set forth in the foregoing **Motion to Dismiss** are true and correct to the best of my knowledge, information and belief and that I expect the Authority to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Dated: January 12, 2022

/s/ Julie A. Quigley
Julie A. Quigley
Director of Customer Service
The Pittsburgh Water and Sewer Authority