

April 5, 2023

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor North
P. O. Box 3265
Harrisburg, PA 17105-3265

Re: Heather Graham Formal Complaint; Docket No. C-2023-3039090

Dear Secretary Chiavetta:

Enclosed are the Borough of Weatherly's Preliminary Objections for the above-referenced matter for electronic filing. Copies will be served in accordance with the attached Certificate of Service.

Very truly yours,

/s/ Isaac P. Wakefield
Isaac P. Wakefield

Enclosure

IPW/mam

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Heather Graham,	:
Complainant	:
v.	: Docket No. C-2023-3039090
	:
Borough of Weatherly,	: Electronically Filed
Respondent	:

NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.61(a)(2), you are hereby notified that you have ten (10) days from the date of service of the enclosed Preliminary Objections to file an Answer, if you so choose. All pleadings, such as an Answer to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for the Borough of Weatherly, and where applicable the Administrative Law Judge presiding over the case.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 32
Harrisburg, PA 17105-3265

With a copy to:

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Dated: April 5, 2023

/s/ Isaac P. Wakefield
Isaac P. Wakefield
Attorney for Respondent

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PRELIMINARY OBJECTIONS OF THE BOROUGH OF WEATHERLY

Pursuant to 52 Pa. Code § 5.101(a) of the regulations of the Pennsylvania Public Utility Commission (“Commission”), the Borough of Weatherly (“Borough”) submits the following Preliminary Objections to the Formal Complaint of Heather Graham (“Complainant”) and requests dismissal of the Formal Complaint. Pursuant to 52 Pa. Code §§ 5.61 and 5.101(d) of the Commission’s regulations, the Borough filed an Answer to the Formal Complaint contemporaneously. In support of these Preliminary Objections, the Borough states as follows:

I. INTRODUCTION

1. The Borough is located in Carbon County, Pennsylvania and maintains a principal address of 61 West Main Street, Weatherly, PA 18255.
2. The Borough owns and operates a municipal electric system consistent with, and pursuant to, Chapter 24A, “Manufacture and Supply of Electricity,” of Pennsylvania’s Borough Code, 8 Pa.C.S. § 101, *et seq.* (the “Electric System”).
3. Complainant is the owner of a tract of land—wholly located in the Borough—more particularly identified as Parcel ID 102-58-S4 (the “Graham Property”).
4. Complainant’s Formal Complaint refers to a March 1, 2023 Petition for Declaratory Order that the Borough filed with the Commission at docket P-2023-3038615, requesting a declaration by the Commission that the Borough may provide electric service to a discrete number

of customers located outside of its municipal boundaries without being subjected to the Commission's jurisdiction.

5. The Graham Property is not the subject of the Borough's March 1, 2023 Petition.

6. Instead, the Graham Property adjoins Fritz Lane, which separates it from the subject properties within the March 1, 2023 Petition.

7. On March 20, 2023, the Borough was served with a handwritten, Formal Complaint that initiated this matter.

8. In it, the Complainant asserts that the Borough is not able to place new electric poles and lines along a private road that borders the Graham Property, that is, Fritz Lane. Complainant additionally invokes various unspecified environmental concerns in the event electric poles and lines are placed in the future.

9. Critically, once more, the Graham Property is entirely located within the Borough and Complainant is a Borough electric customer.

10. The Borough's March 1, 2023 Petition at Docket P-2023-3038615 is a wholly distinct matter from the issues Complainant raises here. It relates exclusively to confirming that the Borough providing electric services to three customers beyond its boundary with the consent of those owners and the jurisdictional utility would not be subject to the Commission's jurisdiction.

11. The instant Formal Complaint seems to take exception as to *how* (physically) the Borough may proceed with providing electric service to the discrete customers beyond its boundaries in the event the Borough elects to do so. Doing so is premature and misapprehends the scope of relief the Borough seeks in Docket P-2023-3038615.

12. The Complainant seems to misapprehend the requested relief at Docket P-2023-3038615 and has reflexively filed the instant Formal Complaint raising private property concerns improperly before the Commission.

13. None of the allegations contained in the Formal Complaint involve matters over which the Commission has jurisdiction.

14. Furthermore, the Commission does not have statutory authority to grant the relief requested in the Formal Complaint.

15. For these reasons, the Commission should dismiss the Formal Complaint and a hearing is not necessary.

II. ARGUMENT

A. Applicable Legal Standards.

17. A person may file a Formal Complaint with the Commission that *claims violation of a statute that the Commission has jurisdiction to administer*. 52 Pa. Code § 5.21(a) (emphasis added).

18. The Commission's procedural rules permit the filing of preliminary objections similar to Pennsylvania civil practice regarding the same. *See* 52 Pa. Code § 5.101(a)(1)-(7); *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, Docket No. C-00935435 (Pa.P.U.C. Jul. 18, 1994).

19. Pursuant to 52 Pa. Code § 5.101(a), preliminary objections must specifically state 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; and
- (7) Standing of a party to participate in the proceeding.

20. Additionally, the Commission is authorized to dismiss a Formal Complaint if a hearing is not necessary. 52 Pa. Code § 5.21(d).

21. A hearing is not necessary if no factual issues pertinent to the resolution of a case exist. *See* 66 Pa.C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n*, 563 A.2d 557 (Pa. Cmwlth. 1989).

B. The Commission Lacks Jurisdiction Over the Borough.

22. Pursuant to 52 Pa. Code § 5.101(a)(1), preliminary objections may be filed against a Formal Complaint because the Commission lacks jurisdiction.

23. The Commission is a creation of Pennsylvania's General Assembly and has only the powers and authority granted to it and contained within the Public Utility Code. *Marion Werle v. Respond Power, LLC*, Docket No. C-2014-2429158, at *1 (Pa.P.U.C. Oct. 9, 2014); *see Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

24. "Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy." *Werle*, at *1 (citing *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. denied*, 637 A.2d 293 (Pa. 1993)).

25. The parties may not confer jurisdiction on the Commission where it otherwise does not exist. *Roberts v. Martano*, 235 A.2d 602 (Pa. 1967).

26. 52 Pa. Code § 5.21(a) states, "[a] person complaining of an act done or omitted to be done by a person *subject to the jurisdiction of the Commission*, in violation, or claimed violation

of a statute *which the Commission has jurisdiction to administer*, or of a regulation or order of the *Commission*, may file a formal complaint with the Commission.” (emphasis added).

27. Complainant is simply the owner of the Graham Property, which is located entirely within the Borough’s municipal boundaries and receives electric service from the Borough. The matters addressed in the Formal Complaint do not allege the violation of a statute over which the Commission has jurisdiction or a regulation or order of the Commission and involve parties over which the Commission lacks jurisdiction.

28. Critically, with respect to electric service provided by a municipal corporation to customers within its limits, the Commission lacks jurisdiction. *Wasneuski v. Borough of Ephrata*, Docket No. C-2016-2522689, at *6, 2017 WL 2242579 (Pa.P.U.C. May 18, 2017).

29. The issues Complainant invokes relate exclusively to access issues and property rights between the Borough, a municipal corporation, and a Borough customer with respect to that customer’s property located wholly inside the Borough limits. Such matters will be subject, if at all, to the provisions of the Borough Code and other relevant law—not to the Public Utility Code or Commission regulations.

30. The Commission is without jurisdiction under these circumstances and no factual assertion from the Borough is required to support the Commission’s lack of jurisdiction in this matter.

C. The Formal Complaint is Legal Insufficient.

31. Pursuant to 52 Pa. Code § 5.101(a)(4), preliminary objections may be filed against a Formal Complaint on the basis of legal insufficiency.

32. Formal Complaints must meet certain minimum requirements, which include “a clear and concise statement of the act or omission being complained of including the result of any

informal complaint or informal investigation” and “a clear and concise statement of the relief sought.” 52 Pa. Code § 5.22(a)(1)-(7).

33. The Formal Complaint objects to the Borough’s “jurisdiction” to place poles or lines on private property without first acquiring easements.

34. It further raises vague environmental concerns and hypothesizes, without justification, about future Borough electric service customers.

35. Accepting all of the factual averments set forth in the Formal Complaint as true, there is no basis upon which the Commission can conclude the Borough has violated the Public Utility Code, Commission regulations, or a Commission order.

D. The Formal Complaint Includes Impertinent Matter.

36. Pursuant to 52 Pa. Code § 5.101(a)(2), preliminary objections may be filed against a Formal Complaint on the basis of inclusion of an impertinent matter.

37. The singular relief requested under the Formal Complaint is for the Commission to order the Borough to conduct environmental studies for installation of utility poles on the Graham Property, which is wholly located within the Borough.

38. The Pennsylvania General Assembly has not authorized the Commission to grant relief of this nature to municipal corporations outside of its jurisdiction.

39. Because the Formal Complaint requests relief that could not be granted even if all of its factual averments were proved, it contains an impertinent matter and should be dismissed.

III. CONCLUSION

WHEREFORE, on the basis of the foregoing, the Borough of Weatherly respectfully requests dismissal of the Formal Complaint filed by Heather Graham and such other relief as may be deemed appropriate.

Respectfully Submitted,
SALZMANN HUGHES, P.C.

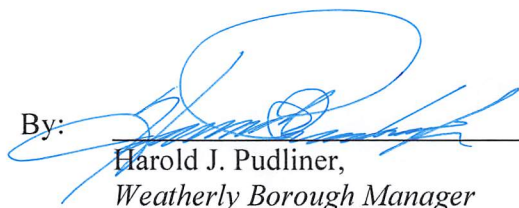
Date: April 5, 2023

By: /s/ Isaac P. Wakefield
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Attorneys for Respondent

VERIFICATION

I, Harold J. Pudliner, Borough Manager for Weatherly Borough, hereby state that the facts set forth above are true and correct to the best of my knowledge, information, and belief, and that I expect 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).

Date: April 5, 2023

By: 

Harold J. Pudliner,
Weatherly Borough Manager

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2023, a true and correct copy of the above-referenced Preliminary Objections was served upon the parties listed below, via first-class mail, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

Heather Graham
210 Laurytown Road
Weatherly, PA 18255

Date: April 5, 2023

By: /s/ Isaac P. Wakefield
Isaac P. Wakefield