

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Heather Graham	:	
	:	
v.	:	C-2023-3039090
	:	
Petition for Declaratory Order of the Borough of Weatherly	:	

**INITIAL DECISION**

Before  
Chad L. Allensworth  
Administrative Law Judge

**INTRODUCTION**

This Initial Decision grants the preliminary objections asserting lack of jurisdiction regarding a complaint seeking relief for potential actions by a borough to provide electric service. The complaint will be denied because the Commission has no jurisdiction over the borough or its proposed service.

**HISTORY OF THE PROCEEDING**

On March 20, 2023, Heather Graham (“Complainant” or “Ms. Graham”) filed a Formal Complaint (“Complaint”) with the Pennsylvania Public Utility Commission (“Commission”) against the Petition for Declaratory Order (“Petition”) filed by the Borough of Weatherly (“Borough” or “Respondent”).<sup>1</sup> In her Complaint, Ms. Graham alleged that there was

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<sup>1</sup> Complainant filed the identical Complaint against the Petition in question in the case at Docket No. P-2023-3038615 on March 20, 2023. By Order dated May 18, 2023, the Commission granted the Petition for Declaratory Order at Docket No. P-2023-3038615 stating that the Borough is not providing a public utility service under the Public Utility Code and the provision of electric service to limited extraterritorial customers does not bring them within the jurisdiction of the Commission. *Petition for Declaratory Ord. of the Borough of Weatherly Regarding the Provision of Elec. Serv.*, Docket No. P-2023-3038615 (Opinion and Order entered May 18, 2023).

a problem with the “provision of electrical services” related to the Borough. (Complaint ¶ 4). Specifically, Ms. Graham asserted that that the proposed services from the Borough to another property would require placement of new electrical poles and lines on her private property without authorization and with potential disruption to existing forest/wetlands. (Complaint ¶ 5). Ms. Graham requests that an environmental study be completed and appears to object to placement of poles or lines on her property. (Complaint ¶¶ 5, 7).

On April 5, 2023, the Borough filed Preliminary Objections (“POs”) requesting dismissal of the Complaint filed by Ms. Graham and any other appropriate relief. (POs, p.6). Specifically, the Borough raised objections regarding lack of jurisdiction, legal insufficiency and inclusion of impertinent matter. (POs, pp.4-6). The POs included a notice to plead.

On April 6, 2023, the Borough filed a timely Answer in which it denied the material allegations of the Complaint. Specifically, the Borough denied that the requested declaratory relief in the Petition under Docket No. P-2023-3038615 would require placement of new electric poles and lines on Ms. Graham’s property as the Borough has not determined if it would provide the service nor evaluated or determined a course of action on how it would provide the service. (Answer ¶ 4). The Borough averred that at this time it is only seeking a declaratory order to confirm that service to a discrete number of customers beyond its limits would not be subject to the Commission’s jurisdiction. (Answer ¶ 4).

The Complainant did not file an Answer to the POs. The case has been assigned to the undersigned and the POs are now ripe for disposition.

#### FINDINGS OF FACT

1. The Complainant is Heather Graham.
2. The Respondent is the Borough of Weatherly.

3. Ms. Graham filed a Complaint with the Commission against the Borough on March 20, 2023.

4. Ms. Graham owns property that is located on Fritz Lane within the Borough of Weatherly in Carbon County, Pennsylvania (“Graham Property”). (Complaint ¶ 1).

5. The Complaint alleges that the Borough is seeking to provide electric service to another property and this would require placement of new electrical poles and lines on her private property. (Complaint ¶ 5).

6. The properties that the Borough would potentially provide electric service to are identified as Parcel Nos. 102-27-B.7.01 and 102-27-B.7.02, which are owned by David Lewis (“Lewis Properties”). (Complaint ¶ 1).

7. The Borough is not a jurisdictional public utility under the Public Utility Code.

8. On April 5, 2023, the Borough filed Preliminary Objections seeking dismissal of the Complaint based on lack of jurisdiction, legal insufficiency and inclusion of impertinent matter. (POs, pp.4-6).

### DISCUSSION

Commission regulations permit the filing of preliminary objections. 52 Pa. Code § 5.101(a)(1)-(7). Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections. *Equitable Small Transp. Intervenor v. Equitable Gas Co.*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994). Commission regulations provide:

**§ 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).

In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the Complainant, recovery or relief is possible. *Dept. of Auditor Gen. v. State Emp's. Ret. Sys.*, 836 A.2d 1053 (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 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 Emp's. Ret. Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997). The POs can be granted only if recovery or relief is not possible after all the Complainant's averments in the complaint are viewed as true for purposes of deciding the preliminary objections, using only those facts specifically admitted. *Roc v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1985).

For the Complainant to prevail, there must be a statute, regulation or order which the Commission is authorized to enforce. The Complaint must also set forth an act done or

omitted to be done by respondent in violation of a law that the Commission has jurisdiction to administer. 66 Pa.C.S. § 701; 52 Pa. Code § 5.21(a).

The POs filed by the Borough assert that the Complaint should be dismissed for the following grounds: (a) lack of jurisdiction under 52 Pa. Code § 5.101(a)(1), (b) legal insufficiency of pleading under 52 Pa. Code § 5.101(a)(4) and (c) inclusion of impertinent matter under 52 Pa. Code § 5.101(2). These POs will be addressed below.

### Lack of Subject Matter Jurisdiction

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it and contained in the Public Utility Code. *Shedlosky v. Pa. Elec. 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. Martano*, 235 A. 2d 602 (Pa. 1967). 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).

Viewing the Complaint in this case in the light most favorable to Ms. Graham, the Borough is a municipal corporation providing electric service within Borough limits and currently falls outside of the jurisdiction of the Public Utility Code or Commission regulations. Ms. Graham owns property within the Borough and receives her electric service from the Borough. The Borough has filed a Petition for a Declaratory Order from the Commission regarding potentially providing electric service to an extraterritorial property. This potential provision of service may involve placement of electric poles and lines on her private property and invasion to forest/wetlands. The Complaint was filed in “protest” of the Borough’s action filed with the Commission. Accepting all these facts as true for purposes of disposing of the preliminary objection, the Respondent contends that the Commission has no jurisdiction.

The Public Utility Code grants the Commission the general administrative power and authority to supervise and regulate all public utilities doing business in the Commonwealth of Pennsylvania. 66 Pa.C.S. § 501(b). "Public utility" is defined in part as any person or corporation which owns or operates equipment or facilities for the producing, generating, transmitting, distribution, or furnishing electricity. 66 Pa.C.S. § 102. The definition of corporation excludes, except as otherwise provided, municipal corporations. *Id.* Respondent is neither a person nor a corporation as defined by the Public Utility Code and therefore not a public utility. Rather, Respondent is a municipal corporation, defined by the Public Utility Code as all cities, boroughs, towns, townships, or counties of this Commonwealth, and also any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility. *Id.*

The Commission has limited jurisdiction over municipal corporations. Generally, the Commission may regulate utility service provided by a municipal corporation only when it provides service beyond its corporate limits. 66 Pa.C.S. § 1301. Similarly, Section 1501 provides that the Commission may regulate utility service provided by a municipal corporation only for service it provides beyond its corporate limits. 66 Pa.C.S. § 1501. Thus, it is axiomatic that the Commission lacks jurisdiction over service provided within the Borough's limits.

The Commission has also previously held that a municipal corporation's extraterritorial service provided "to a [limited] number of isolated individuals outside of the municipal boundaries under special circumstances [does] not constitute public utility service." *Petition of the City of Titusville for a Declaratory Ord.*, Docket No. P-2013-2376600, at 4 (Tentative Order entered Apr. 23, 2014) ("*Titusville*"). The "special circumstances" in *Titusville* involved the fact that the 101 extraterritorial customers lived in close proximity to both the City's boundaries and water mains, and further, that the City had averred that it: (1) never held itself out as being engaged in the business of supplying water service to the public located outside its City limits; (2) passed an ordinance providing that it would apply the same rules, regulations, and rates to its extraterritorial customers as it did to its customers residing within the City limits; (3) asserted that it would not repeal or modify the ordinance without providing advance notice to the Commission; and (4) assured the Commission that it would not solicit or

serve any additional extraterritorial customers beyond the limited number already being served. *Id.* In *Titusville*, the Commission conditioned its finding that the City’s extraterritorial water service was not jurisdictional public utility service based on the requirements that the City continue to charge its extraterritorial customers the same rates as resident customers and not provide service to any extraterritorial customers beyond those already defined. *Id.* at 5.

Finally, as previously indicated, the Complaint was filed as a “protest” to the action filed by the Borough with the Commission. The Commission has now issued a Declaratory Order at Docket No. P-2023-3038615 finding that the circumstances with the Borough are similar to those presented in *Titusville* and that the extraterritorial service the Borough may potentially provide does not qualify as a public utility service within the meaning of the Public Utility Code. *Petition for Declaratory Ord. of the Borough of Weatherly Regarding the Provision of Elec. Serv.*, Docket No. P-2023-3038615 (Opinion and Order entered May 18, 2023). Thus, there are no issues of material fact to address regarding the Preliminary Objection asserting lack of jurisdiction.

The Commission is granted discretion to dismiss a complaint without a hearing if a hearing is not necessary in the public interest. 66 Pa.C.S. §703(b); 52 Pa. Code §5.21(d). A hearing is necessary only to resolve disputed questions of fact, and is not required to resolve questions of law, policy or discretion. *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm’n*, 817 A.2d 593 (Pa. Cmwlth. 2003); *Lehigh Valley Power Comm. v. Pa. Pub. Util. Comm’n*, 563 A.2d 548 (Pa. Cmwlth. 1989); *Edan Transp. Corp. v. Pa. Pub. Util. Comm’n*, 623 A.2d 6 (Pa. Cmwlth. 1993). As there is no issue of material fact, holding a hearing in this case would be a fruitless exercise.

Accordingly, the Preliminary Objection asserting lack of jurisdiction is granted and the Complaint will be dismissed. The Respondent also contends that the Complaint should be dismissed for legal insufficiency and inclusion of impertinent matter. I need not address these Preliminary Objections since I have already determined that that the Commission lacks jurisdiction.

## CONCLUSIONS OF LAW

1. Commission regulations provide for the filing of preliminary motions. 52 Pa. Code § 5.101(a).

2. In deciding Preliminary Objections, the Commission must accept all the non-moving party's averments in the complaint as true. *Dept. of Auditor Gen. v. State Emp's. Ret. Sys.*, 836 A.2d 1053 (Pa. Cmwlth. 2003); *Ridge v. State Emp's. Ret. Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

3. The Commission may only grant the Preliminary Objections of a party if recovery or relief is not possible after all the Complainant's averments are viewed as true. *Roc v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1985).

4. Where there is doubt as to recovery or relief, the Commission must refuse to sustain the Preliminary Objections. *Dept. of Auditor Gen. v. State Emp's. Ret. Sys.*, 836 A.2d 1053 (Pa. Cmwlth. 2003) (*citing*, *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

5. The Public Utility Code grants the Commission the general administrative power and authority to supervise and regulate all public utilities doing business in the Commonwealth of Pennsylvania. 66 Pa.C.S. § 501(b).

6. The Commission has no jurisdiction over a municipal corporation providing utility service within its corporate limits. 66 Pa.C.S. § 102.

7. The Commission has no jurisdiction over a municipal corporation providing limited extraterritorial service subject to restrictions. *Petition for Declaratory Ord. of the Borough of Weatherly Regarding the Provision of Elec. Serv.*, Docket No. P-2023-3038615 (Opinion and Order entered May 18, 2023).

8. The potential extraterritorial service described by the Borough of Weatherly does not qualify as a public utility service. *Petition for Declaratory Ord. of the Borough of Weatherly Regarding the Provision of Elec. Serv.*, Docket No. P-2023-3038615 (Opinion and Order entered May 18, 2023).

9. The Commission is granted discretion to dismiss a complaint without a hearing if a hearing is not necessary in the public interest. 66 Pa.C.S. § 703(b); 52 Pa. Code § 5.21(d).

10. A hearing in the instant case is not necessary or in the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objections filed by the Borough of Weatherly to the Formal Complaint filed by Heather Graham at Docket No. C-2023-3039090 are hereby granted.

2. That the Formal Complaint filed by Heather Graham in Heather Graham v. Borough of Weatherly at Docket No. C-2023-3039090 is dismissed for lack of jurisdiction.

3. That the matter at Docket No. C-2023-3039090 be marked closed.

Date: May 25, 2023

\_\_\_\_\_/s/  
Chad L. Allensworth  
Administrative Law Judge