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December 19, 2023

Via Electronic Filing
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street – Filing Room (2 North)
Harrisburg, PA 17120

Re: Lindi Turgeon and Dana Turgeon v. Verizon North LLC;
Docket No. C-2021-3026390

Dear Secretary Chiavetta:

Enclosed please find the Exceptions of Verizon North LLC in connection with the above-referenced case, which were electronically filed today.

If you have any questions with regard to this filing, please direct them to me. Thank you for your attention to this matter.

Very truly yours,

Suzan D. Paiva/sau

Suzan D. Paiva
Counsel for Verizon North LLC

SDP/sau
Enclosures

Via Email & US First Class Mail
cc: Honorable John Coogan (jcoogan@pa.gov)
Linda and Dana Turgeon (DTURGEON1970@GMAIL.COM)

CERTIFICATE OF SERVICE

I, Suzan D. Paiva, hereby certify that I have this day served a copy of the Exceptions of Verizon North LLC, upon the participants listed below.

Dated at Philadelphia, Pennsylvania, this 19th day of December, 2023.

VIA EMAIL AND US FIRST CLASS MAIL

Honorable John M. Coogan
Administrative Law Judge
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Lindi Turgeon Dana Turgeon, Complainants	:	
v.	:	Docket No. C-2021-3026390
Verizon Pennsylvania LLC Verizon North LLC, Respondents	:	

EXCEPTIONS OF VERIZON NORTH LLC

Pursuant to 52 Pa. Code § 5.533, Verizon North LLC ("Verizon North") excepts in part to the November 29, 2023, Initial Decision ("ID") of Administrative Law Judge John M. Coogan. Although the ID is largely correct in its factual findings and rejection of any safety issues, it oversteps the Commission's authority by determining the scope and validity of an easement, an issue that is exclusively within the jurisdiction of the courts.

BACKGROUND

Property owner Lindi Turgeon filed this formal complaint contending that a utility pole, various utility lines, a ground stake, and other related utility equipment must be removed from the front of her property because they are outside the Pennsylvania Department of Transportation ("PennDOT") public right-of-way and lack a written easement to be located on her private property.[1] By order issued August 6, 2021, the presiding officer granted in part Verizon North's preliminary objections, dismissed Ms. Turgeon's claims for monetary compensation as outside

[1] The complaint was filed on or about April 30, 2021 and served electronically on June 9, 2021. Although the Commission served and docketed this complaint against Verizon Pennsylvania LLC, the company that serves the area where Ms. Turgeon lives is Verizon North and therefore in his August 6, 2021 order the presiding officer added Verizon North to the caption as a respondent. As the company that owns the pole and serves the area at issue, Verizon North is filing these exceptions.

the Commission's jurisdiction and dismissed "any claims related to trespass, the scope and validity of an easement, or whether Verizon North's facilities are situated within a valid easement." (8/6/21 Order at 4). However, the presiding officer determined not to dismiss the case entirely because he found there were still factual questions of "whether a recorded right-of-way or easement even exists" and the claim that "Verizon North has not maintained safe facilities on her property." (8/6/21 Order at 5). There followed extensive discussions attempting to settle the case through this Commission's mediation unit and a settlement judge process (ID at 10, n. 4), but the parties did not reach an agreement and an evidentiary hearing went forward on August 23, 2023. Ms. Turgeon's husband, Dana Turgeon, was added as a complainant immediately before the hearing.

The facts regarding the pole and other equipment are mostly undisputed and correctly stated by the ID. The pole at issue is located next to the roadway that runs in front of the Turgeons' property and is part of a pole line that runs along Route 403 and holds the service lines of Verizon North (bottom), Comcast (middle) and Penelec (top) to provide telephone, cable and electric service to the neighborhood. There is also an anchor (ground stake) in the ground near the pole on the Turgeons' property with three separate guy wires coming down and attached to it. Verizon North owns the pole, the anchor and its own guy wire and overhead telephone lines, while the other two guy wires, overhead cable and electric utility lines and associated facilities are owned by Comcast and Penelec. (ID at 5-6, FOF 25-30). The pole was installed at this location in 1990 and the pole and anchor were already present when the Turgeons purchased the property on June 9, 1999. (ID at 5, FOF 18-20).[2]

[2] The parties submitted various photographs of the pole and the other facilities for the evidentiary record. (ID at 3-5, FOF 4-7 and 15).

The pole, which was placed at its current location as part of a PennDOT road widening project, is next to but slightly outside the PennDOT public right-of-way that runs alongside Route 403, so that the pole and the anchor are on the Turgeons' property. (ID at 5-6, FOF 22-23, 29-30). Verizon North could not find a written easement for the placement of the pole and related facilities on private property. (ID at 5, FOF 21). The pole, anchor and related facilities have been openly present at this location since 1990, a continuous and uninterrupted period of more than thirty years, and for twenty-four years since the Turgeons purchased the property in 1999. Therefore, Verizon North claims an easement by prescription. Additionally, the June 9, 1999 deed transferring this property to the Turgeons states that the transfer is "under and subject to the conditions, restrictions, reservations, exceptions, easements and rights of way contained in prior instruments of record affecting title to said premises, ***or as are apparent on the premises.***" (Verizon Exhibit 2 (Confidential) (emphasis added); Tr. 92). The pole and associated lines and equipment were "apparent on the premises" at the time of the deed.

While the ID correctly found that there were no safety issues with the pole, lines or other facilities,[3] the ID concluded that the complainants had "satisfied their burden to demonstrate that Verizon North does not have an easement to place its facilities on their property" and so Verizon North must remove its pole, lines and other facilities from the property. (ID at 13-14). Although they were not parties to the case, this directive would also require Comcast and Penelec to remove their facilities because they are attached to this pole.

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[3] The ID correctly held that there were no safety issues with the pole or Verizon North lines. Evaluating the evidence, the ID rejected the contention that Verizon North's line running from the pole across the driveway was too low. It found that the lowest height of the Verizon North line crossing the Turgeons' driveway is fifteen feet, seven inches, which is higher than the National Electric Safety Code (NESC) standard for line height over residential driveways of at least fifteen feet. (ID at 6, FOF 31 and ID at 11-12). In any event, the testimony showed that it would not be necessary to remove the pole in order to raise the lines. (ID at 12). The ID also found that Verizon North had removed the hanging wire mentioned in the complaint. (ID at 5, FOF 24). Verizon North does not except to those portions of the ID finding no safety violations.

EXCEPTIONS

Verizon Exception 1*:* The ID Exceeded This Commission's Jurisdiction By Deciding A Property Right Controversy That Is Within The Exclusive Jurisdiction Of The Courts.

By directing Verizon North to remove its pole and other facilities from the property, the ID substantively decided a property right controversy over which this Commission lacks jurisdiction. Because the validity of Verizon North's property rights to maintain facilities in this location, either through an easement by prescription or under the plain language of the deed, is for the courts to decide and outside this Commission's jurisdiction, the ID should have dismissed the complaint and directed the parties to the court of common pleas to address these issues.

It is fundamental that the Commission must act within, and cannot exceed its jurisdiction,[4] and that jurisdiction cannot be conferred by the parties where none exists.[5] As a "creature of statute," this Commission has only those powers expressly conferred upon it by the Legislature and those powers which arise by necessary implication.[6] In *Fairview Water Co. v. Pennsylvania Pub. Util. Comm'n*., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission does not have jurisdiction to determine the scope and validity of an easement. In numerous decisions over the years since then, the Commission has relied on *Fairview* to confirm that "the Courts of Common Pleas and not this Commission have jurisdiction over substantive property disputes, including questions of trespass, the scope and validity of a utility's right of way, or to determine if a utility's facilities are situated within a valid right of way."[7]

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4 *Loma, Inc. v. Pennsylvania Public Utility Commission,* 682 A.2d 424 (Pa. Cmwlth. 1996).

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

6 *Feingold v. Bell of Pennsylvania,* 477 Pa. 1, 8, 383 A.2d 791, 794 (Pa. 1977). *See also Allegheny County Port Authority v. PA P.U.C.*, 427 Pa. 562, 237 A.2d 602 (Pa. 1967).

7 *Petition of Librandi Machine Shop, Inc. For Declaratory Order Librandi Machine Shop, Inc. v. Metropolitan Edison Company and Borough of Middletown*, P-2018-3000047, 2021 PA. PUC LEXIS 49 (Opinion and Order

The ID exceeds the Commission's jurisdiction over property right issues in two ways. First, by ordering immediate removal of the pole and lines the ID effectively made a substantive determination that Verizon North does ***not*** have a prescriptive easement, instead of leaving that question to the courts, and it erred by openly "disagreeing" with the most recent Commission holding on this issue. Second, the ID overstepped the Commission's authority by interpreting the language of the Turgeons' deed with respect to property rights, instead of leaving that issue to the courts.

A. Prescriptive Easement

In the absence of public right-of-way or a written private easement agreement from the property owner or a predecessor, another way that a utility can obtain property rights to maintain its facilities in a location is through an easement by prescription. This is a well-settled property law doctrine under which a "prescriptive easement is acquired by analogy to the acquisition of title to land through adverse possession for twenty-one years."[8] "A prescriptive easement is a right to use another's property," for example for a utility pole, utility lines, or a road or path, or the like, "which is not inconsistent with the owner's rights and which is acquired by a use that is open, notorious, and uninterrupted for a period of 21 years."[9] There is no doubt that Verizon

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Entered; February 25, 2021); *Lou Amati/Amati Service Station v. West Penn Power Co.*, Docket No. C-00945872 (Order entered October 24, 1996); *Edward Boczar v. PPL Electric Utilities Corporation*, Docket No. C-20016332 (Order entered February 10, 2003); *Messina v. Bell Atlantic-Pa.*, Docket No. C-00968225 (Order entered September 23, 1998).

8 *Morning Call, Inc. v. Bell Atlantic-Pennsylvania Inc.*, 2000 PA Super 294, 761 A.2d 139, 143 (Pa. Super. 2000). As the Superior Court found in the *Morning Call* decision, there are also other equitable doctrines under which a telephone company may obtain property rights for the placement of facilities including an irrevocable license from a prior property owner, but whether any of those issues apply here is for the courts and not this Commission to address.

9 *McNaughton Props., LP v. Barr*, 2009 PA Super 173, 981 A.2d 222, 225 n.2 (Pa. Super. 2009). *See also Rachel Carson Trails Conservancy, Inc. v. Dep't of Conservation & Natural Res.*, 201 A.3d 273, 278 (Commwth Ct 2018)("A prescriptive easement arises where the use of an easement 'has been adverse, open, notorious and uninterrupted for twenty-one years.'")

North presented sufficient evidence to state a *prima facie* case for a prescriptive easement, since the undisputed facts found by the ID establish that the pole and associated facilities have been in the same location since 1990 (an uninterrupted period of over 21 years), easily visible (open and notorious) and not inconsistent with the owner's rights.[10]

It is also well-settled that the Commission does not have jurisdiction to make the ultimate determination of the validity of a prescriptive easement because that is an issue for the courts.[11] The ID agrees that "[c]laims related to trespass, the scope and validity of an easement, or whether facilities are situated within a valid easement, are under the jurisdiction of the Courts of Common Pleas, not the Commission." (ID at 7). The ID found, however, that it did have limited authority to determine "the threshold question of whether a recorded right-of-way or easement even exists" as "a factual determination incident to [the Commission's] jurisdiction." (ID at 8). Where the ID erred is in its conclusion that, without a written recorded easement document, the only alternative is to order the pole and facilities to be immediately removed from the property, notwithstanding that the facts support the existence of a prescriptive easement. This holding effectively finds that there is ***not*** a prescriptive easement and deprives Verizon North of its property right to maintain its facilities in the present location, a substantive determination that exceeds this Commission's jurisdiction and should be made by the courts. What the ID should have done is dismissed the complaint and directed the parties to the courts to determine their respective property rights.

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[10] A "prima facie case" is generally understood to be the introduction by the party with the burden of proof of "sufficient evidence to establish the legal sufficiency of the claim," following which "the burden of production shifts" to the other party "to rebut the complainant's evidence." *Cservak v. Duquesne Light Company*, C-2022-3036252, 2023 PA. PUC LEXIS 278, *12 (Opinion and Order entered October 19, 2023).

[11] *Messina v. Bell Atlantic-Pa.*, Docket No. C-00968225, 1998 Pa. PUC LEXIS 190, *16 (Order entered September 23, 1998) ("A conclusion that Bell has perfected an easement by prescription is the type of matter over which the courts are better suited to decide").

The ID's holding is directly contrary to *Lowry v. Duquesne Light Co.*, Docket No. C-20066074 (Final Order entered March 6, 2007, adopting Initial Decision issued Jan. 10, 2007), in which the Commission (by adoption of the initial decision) addressed the appropriate Commission action in the event that a property owner demands removal of utility facilities and the utility claims a prescriptive easement. Rather than directing immediate removal of the utility facilities, *Lowry* found that "[s]hould either Mr. Lowry or Duquesne wish to prove, or disprove, the existence of an easement by prescription, it must do so in the Allegheny County Court of Common Pleas. Should Mr. Lowry succeed, he could then seek an order of ejectment directing Duquesne to remove its facilities from his property." (*Lowry* ID at 10). The *Lowry* decision explained why it did not order the facilities to be removed, as follows:

> [I]t would be inappropriate for the Commission to order Duquesne to remove its pole and lines from Mr. Lowry's property as the Commission would be in the position of determining that Duquesne does not have a valid prescriptive easement, a determination outside of its authority. Further, such an order would not only affect service to Mr. Lowry, but also to his immediate neighbors and a nearby community park.

The Commission should follow the *Lowry* decision and reach the same conclusion here.

The ID acknowledged *Lowry*, and even agreed "that *Lowry* appears to support Verizon North's position." (ID at 9). However, the ID stated that it "disagree[s]" with the decision adopted by the Commission as its final order in *Lowry* because the ID believes it contradicts a 1998 Commission decision in *Messina v. Bell Atlantic-Pa.*, Docket No. C-00968225 (Opinion and Order entered Sept. 23, 1998). But the *Messina* decision is distinguishable on its facts. The telephone lines in that case not only were present on private property without a written easement (but potentially with a prescriptive easement), but also the complainant alleged that they presented a safety issue because they were too close to an addition built to the complainant's house and touched the house in high winds. (Messina ID 5/1/97). The Commission found that

"the Complainant has carried his burden of proof regarding a violation of Section 1501 of the Public Utility Code" and that "Bell shall move the offending pole to a different location on the Complainant's property" where "[w]e conclude that the request by the Complainant [to move the pole and lines] shall be construed as Mr. Messina's acknowledgment of an easement for the new location" and that "we have jurisdiction to grant the relief requested due to our oversight over the service and facilities of a utility, which definitions are broadly construed."[12] It is not clear that, absent the safety issue, the Commission in *Messina* would have required the pole to be moved since it found that "this Commission should not engage in a determination of the property rights of Bell and the Complainant. A conclusion that Bell has perfected an easement by prescription is the type of matter over which the courts are better suited to decide."[13] Moreover, the Commission in *Messina* only required the pole to be moved to a different location ***on the same private property***, not removed from the property altogether, again suggesting the Commission was concerned more with the safety issue than the lack of a written easement.

Even if *Messina* stands for the proposition that the Commission has the authority as "a threshold factual determination that is incident to our jurisdiction" to determine "the mere existence of [the utility's] asserted [property] right,"[14] and to order removal of the equipment if it does not find such facts, Verizon North presented sufficient evidence to make a threshold factual determination that the asserted property right of a prescriptive easement exists in this case. It is not logical to suggest that the only way this "threshold factual determination" could possibly be satisfied is to demonstrate the existence of a written recorded easement. There are other equally valid ways to demonstrate a property right to keep utility facilities in place on private property,

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[12] 1998 Pa. PUC LEXIS 190, *17.

[13] 1998 Pa. PUC LEXIS 190, *16.

[14] 1998 Pa. PUC LEXIS 190, *12.

as the Superior Court explained in *Morning Call, Inc. v. Bell Atlantic-Pennsylvania Inc.*, 2000 PA Super 294, 761 A.2d 139, 143 (Pa. Super. 2000). These facts also should be sufficient to satisfy the Commission's threshold factual determination. Perhaps if a complaint case presented no factual evidence to make a *prima facie* case of a prescriptive easement or any other written or equitable property right, then the Commission could conclude based on the threshold factual determination that the equipment must be moved. But where the facts establish that there is a *prima facie* case for a property right that is enforceable and recognized by the courts, then the validity of that right should be decided by the courts and the Commission should dismiss the complaint and defer to the courts.

Contrary to the ID's recommendation that the Commission should simply ignore its own holding in *Lowry* in favor of the ID's limited interpretation of a much older decision in *Messina*, the Commission should instead distinguish the two cases and find that the present situation falls under the *Lowry* decision.[15] In the present case the ID found no safety issue with the current location of the pole and lines, so Section 1501 does not provide a basis to require the facilities to be moved as it did in *Messina*. Likewise, the ID found sufficient facts to establish a *prima facie* case of a prescriptive easement. Thus, the present facts are akin to the situation in *Lowry*, where requiring the facilities to be removed would be tantamount to determining that Verizon North does not have a valid prescriptive easement, a determination outside of the Commission's authority, and would affect not only Verizon North's service but also electric and cable service to the neighborhood.

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[15] As an administrative agency the Commission is not bound by the rule of *stare decisis,* but it must render consistent opinions and should either follow, distinguish or overrule its own precedent. *Bell Atlantic-Pennsylvania, Inc. v. Pa. PUC*, 672 A.2d 352 (Pa. Cmwlth. 1995). If the Commission agrees with the ID that the two cases are contradictory, then it should follow the better reasoned and more recent decision in *Lowry* and overrule any contradictory holdings in *Messina*.

The Commission should reject the ID's conclusion that Verizon North must remove its facilities from the property. Instead, it should dismiss the complaint and allow the courts to decide these property right issues.

B. Deed

The ID also exceeded this Commission's authority by interpreting the language of the Turgeons' deed. It is undisputed that the deed states that the transfer of the property is "under and subject to the conditions, restrictions, reservations, exceptions, easements and rights of way contained in prior instruments of record affecting title to said premises, ***or as are apparent on the premises.***" Verizon Exhibit 2 (Confidential) (emphasis added); Tr. 92. It is also undisputed that the pole and associated equipment were present and "apparent on the premises" at the time of the deed transferring the property to the Turgeons. (ID at 5, FOF 19). Rather than leaving the interpretation of the phrase "or as are apparent on the premises" as to whether it affords any property rights for the placement of the pole and lines to the courts as it should have done, the ID made a substantive interpretation and concluded that "I do not find that this language provides support that Verizon North has an easement on the Turgeons' property." (ID at 8-9). Again, the complaint should have been dismissed and this issue should be left for the courts.

CONCLUSION

For the foregoing reasons the Commission should reject the ID's holding requiring the pole and other facilities to be removed and should dismiss the complaint.

Respectfully submitted,

Date: December 19, 2023

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