

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

David Romanoski	:	C-2023-3043702
	:	
v.	:	
	:	
Pennsylvania Public Utility Commission,	:	
Pennsylvania Department of Transportation,	:	
Norfolk Southern Railway Company,	:	
Dauphin County, and	:	
Derry Township	:	

INITIAL DECISION

Before
Alphonso Arnold III
Administrative Law Judge

INTRODUCTION

This Initial Decision grants the Preliminary Objections filed by the Pennsylvania Department of Transportation, Norfolk Southern Railway Company, Dauphin County, and Derry Township, to the Complaint filed in this matter and dismisses the Complaint for lack of Commission jurisdiction.

HISTORY OF THE PROCEEDINGS

Complaint

On September 28, 2023, David Romanoski (“Complainant” or “Mr. Romanoski”) filed a Formal Complaint (“Complaint”) with the Pennsylvania Public Utility Commission

(“Commission”).¹ In his Complaint, Mr. Romanoski argued that a retaining wall located in Derry Township, Pennsylvania, has deteriorated and poses a danger to the public. Specifically, Mr. Romanoski asserted that cracks have begun to form in the wall and that the handrail on top of the wall is partially detached. On his Complaint form, Mr. Romanoski listed the Commission, the Pennsylvania Department of Transportation (“PennDot”), Derry Township, Dauphin County, and Norfolk Southern Railway Company (“Norfolk”) as Respondents.

Attached to the Complaint were 23 exhibits. Attached as Exhibit 11 is a May 20, 1919, Order entered by the Public Service Commission² (“PSC”) wherein the PSC ordered the elimination of five grade crossings in Derry Township, Dauphin County (“1919 Order”). One of the crossings the PSC ordered eliminated was an at-grade crossing where the tracks of the Philadelphia & Reading Railway Company³ (“PRRC”) crossed the Hockersville Road at the Swatara station in Derry Township (“Swatara Crossing”). The PSC directed that the Swatara Crossing be replaced with a pedestrian subway to be built at the Hockersville Road along with a public highway underneath the subway. The PSC also directed that a retaining wall be built adjacent to the highway. It is this retaining wall that is the subject of the Complaint. The 1919 Order directed PRRC to construct the retaining wall. The 1919 Order assigned maintenance responsibilities to the PRRC over the subway and to the State Highway Department with respect to the highway underneath. The 1919 Order was silent with respect to which party would be responsible for future maintenance over the wall.

For relief, Mr. Romanoski stated that he is seeking “to have the retaining wall inspected and maintained as needed to prevent the railroad-highway crossings from becoming

¹ The Complaint was, initially, docketed at Docket No. T-2023-3040729. On October 30, 2023, the Commission notified the parties that the incorrect docket number was being used to litigate the Complaint and that all the pleadings, answers, motions, and preliminary objections filed at Docket No. T-2023-3040729 have been transferred to Docket No. C-2023-3043702.

² The PSC is the predecessor of the Commission. Act of March 31, 1937, P.L. 160, abolished the PSC and created the Commission.

³ The Philadelphia & Reading Railway Company is the predecessor of Norfolk.

unsafe for the public pursuant to Sections 2702 and 2704 of the Pennsylvania Public Utility Code (“Code”), 66 Pa.C.S. §§ 2702, 2704.”

PennDot

On October 13, 2023, PennDot filed an Answer to the Complaint. In its Answer, PennDot admitted or denied the averments of the Complaint.

Also on October 13, 2023, PennDot filed a Motion to Dismiss the Complaint. PennDot raised three arguments in support of its Motion: (1) That the Board of Property⁴ has exclusive jurisdiction over this matter as the matter involves a disagreement between Complainant and PennDot over whether the retaining wall is within PennDot’s right of way, (2) that, pursuant to State Highway Law,⁵ PennDot is not responsible for the maintenance of structures that are a part of the rural State highway system, such as the wall in question, and (3) that the Commission abolished the crossing near the wall, and therefore, the Commission lacks jurisdiction over the Complaint. PennDot concluded its Motion by requesting dismissal of the Complaint.

On October 23, 2023, Mr. Romanoski filed an Answer to PennDot’s Motion to Dismiss. Mr. Romanoski argued that the 1919 Order abolished the Swatara Crossing and that the crossing was converted into a subway crossing for which the retaining wall was built. Mr. Romanoski argued that the retaining wall is a part of a railroad-highway crossing and that the Commission has the power to regulate railroad-highway crossings. Mr. Romanoski concluded his Answer by requesting that the Motion be dismissed.

⁴ See 71 P.S. § 337.

⁵ See 36 P.S. § 670-501.

Norfolk

On October 16, 2023, Norfolk filed an Answer with New Matter to the Complaint. In its Answer, Norfolk admitted or denied the averments of the Complaint. In its New Matter, Norfolk argued that the Commission has no jurisdiction over the retaining wall because the 1919 Order abolished the five grade crossings in question. Norfolk additionally argued in its New Matter that the Complaint contained no allegations as it relates to Norfolk. Norfolk requested dismissal of the Complaint or alternatively that it be dismissed as a Respondent to these proceedings.

Also on October 16, 2023, Norfolk filed Preliminary Objections to the Complaint. Norfolk argued that the Commission lacks jurisdiction over the retaining wall in question because the five grade crossings in question were abolished through the 1919 Order. Thus, Norfolk argued that the Complaint should be dismissed for lack of Commission jurisdiction, pursuant to 52 Pa. Code § 5.101(a)(1). Alternatively, Norfolk argued that it should be dismissed as a Respondent to these proceedings as Complainant failed to state a claim against Norfolk upon which relief may be granted.⁶

On October 23, 2023, Mr. Romanoski filed an Answer to Norfolk's New Matter. Mr. Romanoski argued that the Swatara Crossing was converted to a subway crossing and as such a railroad-highway crossing exists over which the Commission has jurisdiction. Mr. Romanoski cited to *Norfolk Southern Railway Co. v. Pennsylvania Public Utility Commission*, 971 A.2d 545 (Pa. Cmwlth. 2009) to support his argument, claiming that Norfolk's involvement in that case is identical to Norfolk's involvement in this present case.

Also on October 23, 2023, Mr. Romanoski filed an Answer to Norfolk's Preliminary Objections. Mr. Romanoski argued that the retaining wall was built in connection with the abolishment of the Swatara Crossing, and that a subway crossing was constructed in its place. Mr. Romanoski argued that the PSC in the 1919 Order directed Norfolk's predecessor to

⁶ This is an argument that the Complaint is legally insufficient, pursuant to 52 Pa. Code § 5.101(a)(4).

construct the wall, therefore, it was Norfolk's responsibility to maintain the wall. Mr. Romanoski concluded his Answer by requesting that the Preliminary Objections be dismissed.

Dauphin County and Derry Township

On October 18, 2023, Dauphin County filed an Answer to the Complaint. In its Answer, Dauphin County denied the averments of the Complaint.

Also on October 18, 2023, Dauphin County filed a Motion to Dismiss the Complaint. Dauphin County argued that the 1919 Order abolished the crossing near the retaining wall, and therefore, the Commission lacked jurisdiction over the Complaint. Dauphin County concluded its Motion by requesting dismissal of the Complaint.

On October 24, 2023, Mr. Romanoski filed an Answer to Dauphin County's Motion to Dismiss. Mr. Romanoski argued that the Swatara Crossing was converted to a subway crossing and that the retaining wall was built to support this conversion. Therefore, Mr. Romanoski argued that a railroad-highway crossing exists adjacent to the retaining wall thus the Commission has jurisdiction over the Complaint. Mr. Romanoski concluded his Answer by requesting that the Motion be dismissed.

On October 24, 2023, Derry Township filed an Answer and Motion to Dismiss, wherein it incorporated and joined in the Answer and Motion to Dismiss of Dauphin County.

On October 27, 2023, Mr. Romanoski filed an Answer to Derry Township's Motion to Dismiss. This Answer was identical to his Answer filed against Dauphin County's Motion to Dismiss.

Presiding Officer assignment

On November 1, 2023, the Commission issued a Motion Judge Assignment Notice, assigning the undersigned as presiding officer to this proceeding.

On November 6, 2023, PennDot refiled its Answer and Motion to Dismiss at Docket No. C-2023-3043702.

On November 6, 2023, Norfolk refiled its Answer with New Matter, as well as its Preliminary Objections, at Docket No. C-2023-3043702.

The Preliminary Objections⁷ filed by PennDot, Norfolk, Dauphin County, and Derry Township (“the Respondents”) are ready to be ruled upon. For the reasons discussed below, the Preliminary Objections will be granted, and the Complaint will be dismissed.⁸

FINDINGS OF FACT

1. David Romanoski is the Complainant in this proceeding.
2. The Pennsylvania Public Utility Commission is a Respondent to this proceeding.
3. The Pennsylvania Department of Transportation is a Respondent to this proceeding.
4. The Norfolk Southern Railway Company is a Respondent to this proceeding.
5. Dauphin County is a Respondent to this proceeding.
6. Derry Township is a Respondent to this proceeding.

⁷ The Motions to Dismiss filed by PennDot, Dauphin County, and Derry Township are, in effect, Preliminary Objections.

⁸ The Commission did not file an Answer to the Complaint. With respect to complaints filed against the Commission, no answer need be filed. *See* 52 Pa. Code § 5.21(e).

7. On September 28, 2023, Complainant filed his Complaint with the Commission, seeking Commission assistance in having a retaining wall located in Derry Township, Pennsylvania, inspected and maintained, arguing that the wall has become unsafe for members of the public.

8. The retaining wall that Complainant complained of in his Complaint was built following the issuance of an Order in 1919 by the Public Service Commission.

9. The Public Service Commission's 1919 Order ordered the elimination of five at-grade crossings in Derry Township, including a crossing where the tracks of the Philadelphia & Reading Railway Company crossed the Hockersville Road at the Swatara station in Derry Township ("Swatara Crossing"). This 1919 Order was attached as an exhibit to the Complaint.

10. The PSC in its 1919 Order directed that the Swatara Crossing be replaced with a pedestrian subway to be built at the Hockersville Road along with a public highway underneath the subway.

11. The PSC in its 1919 Order also directed that a retaining wall be built adjacent to the highway.

12. The 1919 Order directed that the Philadelphia & Reading Railway Company construct the retaining wall.

13. The 1919 Order was silent with respect to which party would be responsible for future maintenance over the retaining wall in question.

DISCUSSION

Preliminary Objections

Although captioned as Motions to Dismiss, the Motions filed by PennDot, Dauphin County, and Derry Township are, in effect, Preliminary Objections.⁹ The Commission's Rules of Practice and Procedure permits parties to file preliminary objections. The grounds for preliminary objections are set forth as follows:

- (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 preliminary motion practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. *Equitable Small Transp. Intervenor v. Equitable Gas Co.*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994) (*Equitable*). Any doubt as to the sufficiency of a preliminary objection must be resolved in favor

⁹ See 52 Pa. Code § 1.2(a), which provides that the presiding officer may disregard an error or defect of procedure which does not affect the substantive rights of the parties. Mr. Romanoski's substantive rights are not affected by my treatment of the Motions to Dismiss filed by PennDot, Dauphin County, and Derry Township as Preliminary Objections because Mr. Romanoski had notice of the issues raised in the Motions and had the opportunity, and did in fact, respond to the Motions.

of the non-moving party by refusing to sustain the objections. *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002); *Dept. of Auditor Gen. v. State Emps. Ret. Sys.*, 836 A.2d 1053 (Pa. Cmwlth. 2003).

The Commission must view the Complaint in the light most favorable to the Complainant and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable*.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to 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 follows this standard. *Montague v. Phila. Elec. Co.*, 66 Pa.P.U.C. 24 (1988).

The Commission is granted discretion to dismiss any complaint without a hearing if, in its opinion, 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 when the question presented is one of law, the Commission need not hold a hearing. *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).

A commonality between the Preliminary Objections filed by Norfolk, PennDot, Dauphin County, and Derry Township is that they all assert that the Complaint should be dismissed on the ground that the Commission lacks jurisdiction over the Complaint, pursuant to 52 Pa. Code § 5.101(a)(1).¹⁰ To this end, the Commission, as a creation of the Pennsylvania 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); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). Accordingly, the Commission must act within, and cannot exceed, its jurisdiction. *City*

¹⁰ As this Complaint will be dismissed for lack of Commission jurisdiction, it is not necessary to address the other arguments raised by the Respondents in their Preliminary Objections.

of Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa. Super. 1945). A party to a proceeding cannot confer jurisdiction upon the Commission where jurisdiction does not exist. *Roberts v. Martorano*, 235 A.2d 602 (Pa. 1967). The Commission must have subject matter jurisdiction as a prerequisite to the exercise of its power before it can decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992).

Section 2702 of the Code, 66 Pa.C.S. § 2702, vests the Commission with exclusive jurisdiction to determine the points at which and the manner in which a railroad-highway crossing is to be constructed, relocated, altered, protected, suspended or abolished, as well as the manner and conditions under which a railroad-highway crossing will be maintained, operated and protected to prevent accidents and promote public safety. The Commission possesses exclusive authority to determine and order which parties should perform such work at a crossing and which parties will maintain the crossing in the future, all to effectuate the prevention of accidents and promote public safety. *SEPTA v. Pa. Pub. Util. Comm'n*, 592 A.2d 797 (Pa. Cmwlth. 1991). The Commission's jurisdiction also extends to the approaches of a crossing. *Dept. of Transp. v. Pa. Pub. Util. Comm'n*, 440 A.2d 657 (Pa. Cmwlth. 1982); *Springettsbury v. Pa. Pub. Util. Comm'n*, 289 A.2d 762 (Pa. Cmwlth. 1972).

The definition of a highway is, “A way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular traffic.” 66 Pa.C.S. § 102. A “railroad-highway crossing” is an intersection of a highway with a railroad right-of-way, upon which railroad tracks lie, and can be at, above or below the grade of the railroad tracks. *Se. Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n*, 592 A.2d 797, 800 (Pa. Cmwlth 1991).

The Preliminary Objections will be granted, and the Complaint will be dismissed for lack of Commission jurisdiction.

The Complaint does not involve a railroad-highway crossing, or a component of a railroad-highway crossing. The 1919 Order, of which Complainant attached as an exhibit to his Complaint, approved the abolishment of five at-grade crossings, including the Swatara Crossing. To affect the abolishment of the Swatara Crossing, the PSC directed that the retaining wall in

question be constructed. As the 1919 Order abolished the Swatara Crossing, the wall in question is not associated with or adjacent to an existing railroad-highway crossing. The Commission's power over crossings is limited and applies only to railroad-highway crossings. *See* 66 Pa.C.S. §§ 2702, 2704.

Furthermore, although the PSC through its 1919 Order tasked Norfolk with the responsibility of building the retaining wall, the 1919 Order was silent with respect to maintenance responsibilities over the retaining wall, a fact that Complainant acknowledges in his Complaint.¹¹

In his Answer to Norfolk's New Matter, Complainant made reference to the case of *Norfolk Southern Railway Co. v. Pennsylvania Public Utility Commission*, 971 A.2d 545 (Pa. Cmwlth. 2009) ("*Norfolk 2009*"). *Norfolk 2009* concerned the assignment of responsibility and costs for the future maintenance of a retaining wall that ran alongside a railroad-highway crossing. On appeal to the Pennsylvania Commonwealth Court, Norfolk challenged the Commission's allocation of costs for the repair and future maintenance of the wall. Not at issue in *Norfolk 2009* was whether the Commission had jurisdiction over the retaining wall, because the wall was a component of and adjacent to an existing railroad-highway crossing. As stated above, the 1919 Order abolished the railroad-highway crossing for which the retaining wall was built. The wall is not a component of or adjacent to a railroad-highway crossing.

In the case of *County of Bucks v. Pennsylvania Public Utility Commission*, 684 A.2d 678 (Pa. Cmwlth. 1996), the Commission held Bucks County responsible to bear the majority of the costs associated with the closing of a pedestrian bridge within the county. The bridge was constructed pursuant to a 1917 PSC order in which the PSC ordered that an at-grade railroad-highway crossing be abolished and that the pedestrian bridge be constructed in its place.

¹¹ Had the PSC directed that the PRRC maintain the retaining wall in its 1919 Order, Norfolk arguably would have been responsible for the continued maintenance of the wall through enforcement of that Order. *See* Section 103(b) of the Code, which provides that "All certificates, permits, licenses, *orders*, rules, regulations or tariffs made, issued, or filed under any repealed statute supplied by this part, and in full force and effect upon the effective date of this part, *shall remain in full force and effect* for the term issued, or until revoked, vacated, or modified under the provisions of this part. 66 Pa.C.S. § 103(b) (emphasis added).

On appeal, the Commonwealth Court determined that once the railroad-highway crossing in Bucks County was abolished, the Commission had no jurisdiction over the pedestrian bridge that was constructed in its place.¹² Likewise in this matter, once the Swatara Crossing was abolished, the Commission had no jurisdiction over the retaining wall that was built as a condition of the abolishment of the crossing.

In conclusion, as the railroad-highway crossing adjacent to the retaining wall was abolished, the Complaint does not involve a railroad-highway crossing or a structure that is adjacent to or a component of a railroad-highway crossing. As such, the Commission does not have jurisdiction over the maintenance of the retaining wall. Therefore, the Respondents' Preliminary Objections will be granted, and the Complaint will be dismissed for lack of Commission jurisdiction.

CONCLUSIONS OF LAW

1. Section 5.101 of the Commission's Rules of Administrative Practice and Procedure permits the filing of preliminary objections. 52 Pa. Code § 5.101.

2. The Commission must view the Complaint in the light most favorable to the Complainant and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transp. Intervenors v. Equitable Gas Co.*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994).

3. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections on the ground of lack of Commission jurisdiction. 52 Pa. Code § 5.101(a)(1).

¹² Amtrak's predecessor, the Pennsylvania Railroad, was directed by the 1917 PSC order to maintain the pedestrian bridge. However, Amtrak was exempt under federal law from paying the costs associated with the closing of the pedestrian bridge.

4. The Commission, as a creation of the Pennsylvania 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).

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

6. A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law, the Commission need not hold a hearing. *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).

7. The Commission's power over crossings is limited and applies only to railroad-highway crossings. 66 Pa.C.S. §§ 2702, 2704.

8. A "railroad-highway crossing" is an intersection of a highway with a railroad right-of-way, upon which railroad tracks lie, and can be at, above or below the grade of the railroad tracks. *Se. Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n*, 592 A.2d 797, 800 (Pa. Cmwlth 1991).

9. Once the railroad-highway crossing is abolished, the Commission has no jurisdiction over the structure(s) built in its place. *County of Bucks v. Pa. Pub. Util. Comm'n*, 684 A.2d 678 (Pa. Cmwlth. 1996).

10. The 1919 Order of the PSC abolished the railroad-highway crossing for which the retaining wall in question was built. Therefore, the Commission lacks jurisdiction over the Complaint.

