

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Nieves Abad	:	
	:	
v.	:	C-2024-3047163
	:	
PPL Electric Utilities Corporation	:	

ORDER
GRANTING IN PART, AND DENYING IN PART,
RESPONDENT'S PRELIMINARY OBJECTIONS

HISTORY OF THE PROCEEDING

On February 12, 2024, Nieves Abad (“Complainant”) filed a Formal Complaint against PPL Electric Utilities Corporation (“Respondent”) with the Pennsylvania Public Utility Commission (“Commission”). In his Complaint, Complainant argued that five Respondent utility poles are located on his property without a legal right-of-way. Complainant claimed that two of these utility poles are located in the middle of his driveway and that Respondent refused to remove these two utility poles at his request.

For relief, Complainant requested that the Commission: (1) order Complainant to be compensated in the amount of \$100 per pole, per week since May 1, 2023; (2) order Respondent to remove the five utility poles from his property; (3) come to a resolution in regards to a fair right of way with Respondent; (4) order that all future upgrades to poles, transformers, and the running of new wires be the full responsibility of Respondent; and (5) dismiss two invoices rendered by Respondent to Complainant for damage that Complainant allegedly caused to utility poles. The Complaint was served on Respondent on March 7, 2024.

On March 27, 2024, Respondent filed an Answer to the Formal Complaint. In its Answer, Respondent admitted that it had five utility poles located on or near Complainant’s

property. Respondent asserted that one of the five utility poles is in the public right of way, and that another of the utility poles is the subject of a right of way agreement between Respondent and Real Estate Technology Corporation. Respondent further admitted that three of the utility poles are located on Complainant's property without a signed right of way agreement. Regarding the two utility poles located on Complainant's driveway, Respondent admitted that it spoke with Complainant concerning their relocation to a different portion of Complainant's property. Respondent sent Complainant two invoices concerning damage done to these two poles after Complainant damaged the poles through his tree removal actions. Respondent requested that the Commission deny the Complaint.

Also on March 27, 2024, Respondent filed Preliminary Objections to the Formal Complaint, properly endorsed with a Notice to Plead. In its Preliminary Objections, Respondent requested that the Commission dismiss the portion of the Formal Complaint seeking monetary damages as impertinent matter pursuant to 52 Pa. Code § 5.101(a)(2), arguing that the Commission lacks authority to award damages. Respondent additionally requested that the Commission dismiss the Formal Complaint in its entirety, pursuant to 52 Pa. Code § 5.101(a)(1), arguing that the Commission lacks subject matter jurisdiction over the Complaint. Specifically, Respondent argued that the Complaint raises private contractual and real property issues to which the Commission has no jurisdiction over.

On April 4, 2024, Complainant filed an Answer to the Preliminary Objections, wherein Complainant repeated his assertions from his Complaint and asked that the Preliminary Objections be denied. Complainant also attached multiple documents to his Answer, including what appears to be pictures of the five utility poles in question, letters Complainant sent to Respondent requesting that the utility poles be removed, and the invoices Respondent sent to Complainant concerning damage done to Respondent's utility poles.

On April 23, 2024, the undersigned was assigned as Motion Judge to this proceeding.

Respondent's Preliminary Objections are procedurally ready to be ruled upon. For the reasons discussed below, the Preliminary Objections will be granted in part, and denied in part. This matter will proceed towards an evidentiary hearing.

DISCUSSION

Respondent in this matter filed Preliminary Objections to the Formal Complaint. The Commission's regulations provide that preliminary objections are available to parties and may be filed in response to a pleading. 52 Pa. Code § 5.101(a). The grounds for preliminary objections are limited to those 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).

Here, Respondent's Preliminary Objections assert lack of Commission jurisdiction pursuant to 52 Pa. Code § 5.101(a)(1) and inclusion of impertinent matter pursuant to 52 Pa. Code § 5.101(a)(2).

Commission procedure regarding the disposition of preliminary objections is similar to the procedure utilized in Pennsylvania civil practice. A preliminary objection in civil

practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Pennsylvania State Lodge, Fraternal Order of Police v. Dept. of Conservation & Natural Resources*, 909 A.2d 413 (Pa. Cmwlth. 2006), *aff'd*, 592 Pa. 304, 924 A.2d 1203 (2007).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case 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 Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep't of Auditor General, et al. v. State Employees' Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

Having explained the standards for granting preliminary objections, I will first discuss Respondent's Preliminary Objection that the Commission lacks jurisdiction over the Complaint, pursuant to 52 Pa. Code § 5.101(a)(1).

The Commission regulation at 52 Pa. Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa. Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa. Code § 5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa. Code § 5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n*, 563 A.2d 557 (Pa.Cmwlth. 1989); *Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n*, 563 A.2d 548 (Pa.Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n*, 540 A.2d 1006 (Pa.Cmwlth. 1988); *White Oak Borough Authority v. Pa. Pub. Util. Comm'n*, 103 A.2d 502 (Pa. Super. 1954).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. *Tod and Lisa Shedlosky v. Pennsylvania Electric 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. Martorano*, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. *Hughes v. Pennsylvania State Police*, 619 A.2d 390 (Pa.Cmwlth. 1992) *alloc. denied* 637 A.2d 293 (Pa. 1993).

Viewing the Complaint in the light most favorable to Complainant and accepting all of the factual assertions in the Complaint as true for the purposes of disposing of the Preliminary Objections, Respondent has five utility poles located on Complainant's property. Respondent has refused to relocate two of these poles that are located on the driveway of the property. Respondent has no easement or right of way agreement that would authorize the placement of these utility poles on Complainant's property.

Respondent argued that the Complaint raises issues surrounding the scope and validity of a right of way and that the Commission has no jurisdiction over issues involving the scope and validity of easements, or rights of way. Respondent is correct in that the Commission lacks jurisdiction to interpret an easement or rights of way agreement. In *Fairview Water Co. v.*

Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission lacks jurisdiction to determine the scope and validity of an easement. The Commission has determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. *Anne E. Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (Opinion and Order entered July 3, 2003); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Opinion and Order entered September 15, 1999).

Here, however, the Commission is not being asked to determine the scope and validity of an easement or right of way agreement. Complainant did not in his Complaint admit to the existence of an easement or right of way, but in fact asserted that an easement or right of way for Respondent to utilize his property **does not exist**. As the Complaint denies the existence of any easement or right of way, I cannot conclude that the Commission is being asked to determine the scope and validity of an easement in this matter.¹ I will also note that, in its Answer to the Complaint, Respondent admits that three of the five utility poles in question are not subject to a right of way agreement.

In addition, the Commission has held that the relocation of utility facilities at a customer's request falls within the statutory definition of service and that the Public Utility Code defines service in its broadest and most inclusive sense. *See Barbara Gallagher v. PECO Energy Company*, Docket No. C-2010-2201568 (Order entered September 22, 2011) at 21. Taking the averments and any reasonable inferences from the Complaint to be true, it could reasonably be construed that Complainant may have asserted an unreasonable service allegation in relation to Respondent's refusal to move its utility poles from Complainant's property.

Therefore, for the above reasons, Respondent's Preliminary Objection made pursuant to 52 Pa. Code § 5.101(a)(1) will be denied.

¹ To the extent however, that Complainant asks that the Commission assist the parties in "coming to a resolution in regards to a fair right of way with Respondent," this is a private contractual matter that must be resolved between the parties.

Having discussed Respondent's Preliminary Objection made pursuant to 52 Pa. Code § 5.101(a)(1), I will now discuss Respondent's Preliminary Objection that the Complaint includes impertinent matter, made pursuant to 52 Pa. Code § 5.101(a)(2). In his Complaint, Complainant asked that the Commission compensate Complainant in the amount of \$100 per pole, per week since May 1, 2023. Respondent argued that this portion of the Complaint should be dismissed as the Commission does not have the authority to award damages.

Respondent is correct in that the Commission lacks jurisdiction to award monetary damages to a Complainant in adjudicating a complaint properly brought before this Commission. *See, Poorbaugh v. Pa. PUC*, 666 A.2d 744 (Pa. Cmwlth. 1995). To the extent Complainant wishes to seek compensation from Respondent for the presence of the utility poles on his property, he must pursue such action before a different forum.

For the above reasons, I will grant Respondent's Preliminary Objection made pursuant to 52 Pa. Code § 5.101(a)(2) and dismiss the portion of the Complaint seeking monetary damages.

ORDER

THEREFORE,

IT IS ORDERED:

1. That PPL Electric Utilities Corporation's Preliminary Objections filed in the matter of Nieves Abad v. PPL Electric Utilities Corporation, Docket No. C-2024-3047163, are granted in part, and denied in part.

2. That the portion of PPL Electric Utilities Corporation's Preliminary Objections that seek dismissal of a portion of the Complaint, pursuant to 52 Pa. Code § 5.101(a)(2), is granted.

3. That the portion of the Complaint in the matter of Nieves Abad v. PPL Electric Utilities Corporation, Docket No. C-2024-3047163, seeking monetary damages is stricken.

4. That the portion of PPL Electric Utilities Corporation's Preliminary Objections that seek dismissal of the Complaint in its entirety, pursuant to 52 Pa. Code § 5.101(a)(1), is denied.

5. That an evidentiary hearing will be scheduled in this matter.

Date: May 17, 2024

/s/
Alphonso Arnold III
Administrative Law Judge

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