

Bryce R. Beard
717.237.6041
bbeard@eckertseamans.com

July 1, 2025

Via Electronic Filing

Matt Homsher, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: David M. Smith v. Windstream Pennsylvania, LLC
Docket No. C-2025-3055671

Dear Secretary Homsher:

Enclosed for electronic filing please find Windstream Pennsylvania, LLC's Preliminary Objections with regard to the above-referenced matter.

Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Bryce R. Beard, Esq.

BRB/red
Enclosure

cc: Cert. of Service w/enc.

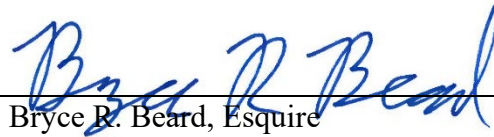
CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing **Preliminary Objections** upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

David M. Smith
8 Old Hickory Lane
Signal Mountain, TN 37377
davidsmith@pbbcs.com

Date: July 1, 2025

A handwritten signature in blue ink that reads "Bryce R. Beard". The signature is written in a cursive style and is positioned above a horizontal line.

Bryce R. Beard, Esquire
Windstream Pennsylvania, LLC

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

David M. Smith,	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2025-3055671
	:	
Windstream Pennsylvania, LLC,	:	
Respondent.	:	
	:	

NOTICE TO PLEAD

To: David M. Smith
8 Old Hickory Lane
Signal Mountain, TN 37377
davidsmith@pbbcs.com

You are hereby notified that a reply to the **Preliminary Objections** of Windstream Pennsylvania, LLC must be filed within 10 days of the date of service.

All pleadings, such as a reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for the Windstream Pennsylvania, LLC and, where applicable, the Administrative Law Judge (“ALJ”) presiding over this proceeding.

File with:

Matthew Homsher, Secretary
Pennsylvania Public Utility
Commission
400 North Street
Harrisburg, PA 17120
<https://efiling.puc.pa.gov/Login>

With a copy to:

Norman J. Kennard, Esquire
Bryce R. Beard, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
nkennard@eckertseamans.com
bbeard@eckertseamans.com

/s/ Bryce R. Beard

Bryce R. Beard, Esquire

Counsel for Windstream Pennsylvania, LLC

Date: July 1, 2025

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

David M. Smith,	:	
Complainant,	:	
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v.	:	Docket No. C-2025-3055671
	:	
Windstream Pennsylvania, LLC,	:	
Respondent.	:	
	:	

**WINDSTREAM PENNSYLVANIA LLC’S
PRELIMINARY OBJECTIONS TO COMPLAINT**

Pursuant to 52 Pa. Code § 5.101, Windstream Pennsylvania, LLC (“Windstream” or Respondent”) submits the following Preliminary Objections to the Complaint of David M. Smith (“Complainant” or “Mr. Smith”), which was served on Windstream by the Pennsylvania Public Utility Commission (“Commission” or “PUC”) on June 11, 2025. Pursuant to 52 Pa. Code §§ 5.61 and 5.62, Windstream is also filing an Answer and New Matter to the Complaint. In support of these Preliminary Objections, Windstream avers as follows:

I. INTRODUCTION

1. Mr. Smith filed a Formal Complaint with the Commission alleging that Windstream should be ordered to “remove poles on [the subject] property because [Windstream] has no easement approval to have placed the poles on [the] property.” Complaint at 5. The Complaint further alleges that the poles serve a “residence west of [the subject] property which is no longer in service.” Complaint at 4. The Complaint also alleges that Windstream’s poles “rum(sic) about 500 feet along Cross Roads Blvd, S.R. 2002 in Beccaria Township and then turn west across my property for about 500 feet to an abandoned residence on proprty(sic) West of mine. The poles along Cross Roads Blvd are on my property not within the Right of Way of highway.” Complaint at 5.

2. Windstream is filing these Preliminary Objections in an effort to secure the just, speedy, and inexpensive dismissal of the Complaint against Windstream. For the reasons stated herein and in Windstream’s Answer and New Matter to the Complaint, which is incorporated herein by reference, the Complaint should be dismissed as a preliminary matter because the Commission lacks jurisdiction over the subject matter of this dispute – the scope and validity of easements. Second, Windstream also seeks dismissal because Mr. Smith lacks standing to bring the Complaint, as he is not the landowner of the parcel in question based on public records. Third, Windstream seeks dismissal as the Complaint alleges no violation of the Pennsylvania Public Utility Code (“Code”), Commission’s Regulations, or any prior order, making Mr. Smith’s complaint legally insufficient. Fourth, Windstream seeks dismissal as Mr. Smith failed to join indispensable parties, here the allegedly “abandoned residence” neighboring his property, Parcel No. J17-000-00071, who according to public record is a “James Diven” who is directly impacted by this proceeding where – if the relief sought is granted (it should not be) – James Diven’s property would lose access to Windstream’s public utility service.

II. PRELIMINARY OBJECTIONS

A. Applicable Legal Standards

11. The Commission’s Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101(a).

12. Under Section 5.101(a) of the Commission’s regulations, 52 Pa. Code § 5.101(a)(1)–(7), 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.

13. The moving party may not rely on its own factual assertions but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts.¹ However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.²

14. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.³

B. Dismissal Based on Lack of Commission Jurisdiction over Easements and Property Rights, 52 Pa. Code § 5.101(a)(1).

15. Section 5.101(a)(1) of the Commission’s regulations permits the filing of a preliminary objection based on a lack of Commission jurisdiction over the subject matter of the proceeding.

12. Accepting all well-pleaded as stated in the Complaint, Mr. Smith raises matters of property law and easement rights, seeking exclusively that the Commission order Windstream to “remove poles on [the property] because [Windstream has] no easement approval to have placed poles on [the] property.” Complaint at 5.

¹ *County of Allegheny v. Commw. of Pa.*, 490 A.2d 402 (Pa. 1985).

² *Stanton-Negley Drug Co. v. Dep’t of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Commw. Ct. 2007).

³ *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Commw. Ct. 2003); *P.J.S. v. Pa. State Ethics Comm’n*, 669 A.2d 1105 (Pa. Commw. Ct. 1996).

13. As a preliminary matter, it is well settled that the Commission may not exceed its jurisdiction and must act within it. *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 the power to decide a controversy. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Commw. Ct. 1992). As a creation of the legislature, the Commission possesses only the authority that the state legislature has specifically granted to it in the Code. 66 Pa.C.S. §§ 101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell*, 383 A.2d 791 (Pa. 1977).

14. The Commission lacks jurisdiction to adjudicate the validity and scope of easements. In *Fairview Water Co. v. Pa. 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. The Commission itself has reiterated this principle in multiple decisions. *Lasko v. Windstream Pa., LLC*, Docket No. C2010-2217869 (Final Order dated Apr. 1, 2011); *Perrige v. Metro. Edison Co.*, Docket No. C00004110 (Order entered July 3, 2003); *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (Order entered Sept. 15, 1999); *Baker and Blume v. SPLP*, Docket No. C-2020-3022169, Initial Decision at 10–11 (ID entered Dec. 8, 2020).

16. Even reading all well-pleaded facts in Mr. Smith's favor, the law is clear that the contents of Mr. Smith's complaint are outside the Commission's jurisdiction. Therefore, the Commission should dismiss the Complaint.

C. Dismissal Based on Lack of Standing as Public Record does not show Mr. Smith owns the property at issue, 52 Pa. Code § 5.101(a)(7).

17. Section 5.101(a)(7) of the Commission's regulations permits the filing of a preliminary objection based on a lack of standing of a party to participate in the proceeding.

18. Under Pennsylvania precedent, it is axiomatic that:

[A] party seeking judicial resolution of a controversy “must establish as a threshold matter that he has standing to maintain the action.” *Fumo v. City of Philadelphia*, 601 Pa. 322, 972 A.2d 487, 496 (Pa. 2009) “The core concept of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not aggrieved thereby and has no standing to obtain a judicial resolution to his challenge.” *Id.* (citing *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 280–81 (Pa. 1975)).

In re Walker, 2019 PA Super 120, 208 A.3d 472, 475 (Pa. Super. Ct. 2019) (citing *Johnson v. Am. Std.*, 607 Pa. 492, 8 A.3d 318, 329 (2010)). The inquiry into standing ascertains whether a party is the proper party entitled to make the legal challenge to the matter involved. *In re Trust Under Agreement of Keiser*, 392 Pa. Super. 146, 572 A.2d 734, 736 (1990). A person who has no stake in the matter has no standing to obtain judicial resolution of her challenge to the matter. *Id.*

19. The concept of “standing,” in its accurate legal sense, is concerned only with the question of who is entitled to make a legal challenge to the matter involved. *In re Fry*, 110 A.3d 1103 (Pa. Commw. Ct. 2015). In determining whether a party has standing, a court is concerned only with the question of who is entitled to make a legal challenge, and not the merits of that challenge. *In re Gen. Election 2014*, 111 A.3d 785 (Pa. Commw. Ct. 2015); *Unified Sportsmen of Pa. v. Pa. Game Comm’n*, 903 A.2d 117 (Pa. Commw. Ct. 2006).

20. For purposes of standing, a party is “aggrieved” if she has a substantial, direct, and immediate interest in the claim sought to be litigated. *Diop v. Bur. of Prof’l and Occupational Affairs*, 272 A.3d 548 (Pa. Commw. Ct. 2022). Courts have defined “direct” and “immediate” as:

A “direct” interest requires a showing that the matter complained of caused harm to the party’s interest. An “immediate” interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it.

South Whitehall Twp Police Serv. v. South Whitehall Twp., 521 Pa. 82, 555 A.2d 793, 795 (1989) (internal citations omitted). An interest is a “substantial interest” for purposes of aggrievement and standing if it is an interest in the resolution of the challenge that surpasses the

common or abstract interest of all citizens in procuring obedience to the law. *Yocum v. Commw. of Pa. Gaming Control Bd.*, 639 Pa. 521, 161 A.3d 228 (2017).

21. The Commission has held that, in general, a complainant must be the customer of the utility in order to have standing to file a complaint about its utility service.⁴ In other words, a complainant who is not a customer of a utility, generally, does not have the requisite substantial, direct, and immediate interest necessary to confer standing to bring the complaint about the service of that utility.

22. Notwithstanding the Commission's lack of subject matter jurisdiction over the complaint, as explained *supra* and further in Windstream's Answer and New Matter,⁵ public records as provided in Windstream's Appendix A and B shows that Mr. David M. Smith does not own the property in question located at Parcel No. J17-000-00072.

23. Based on information and belief, public records maintained by the Clearfield County recorder of deeds shows that the parcel identified as Parcel No. J17-000-00072 is owned **exclusively** by a "Kathleen S. Smith." Attached to Windstream's New Matter as **Appendix A** is a copy of the current deed for the property.

24. "Kathleen S. Smith" is also identified on the Clearfield County property tax mapper, providing her mailing address of 1101 S Oakwood Ave, Beckley, West Virginia 25801. A copy of the public tax record is provided as **Appendix B** to Windstream's New Matter.

25. Based on information and belief, Mr. David M. Smith does not own the property in question at Map No. 101-J17-000-00072 located along S.R. 2002.

⁴ See *Re: Pa. Am. Water Co.*, 85 Pa. PUC 548 (1995); *PUC v. Marietta Gravity Water Co.*, 87 Pa. PUC 864 (1997).

⁵ Windstream's allegations of lack of standing are based, in part, on information contained in Windstream's Answer and New Matter. As such, as an alternative to treating this argument as a Preliminary Objection, Windstream requests that the Commission wait for the Complainants' Response to New Matter and then treat this Preliminary Objection as a Motion to Dismiss.

26. On information and belief, Mr. David M. Smith is not an attorney and does not represent Kathleen S. Smith in such capacity in this Complaint.

27. As such, the Complainant lacks standing in his own right to bring a Complaint against Windstream.

28. Additionally, to the extent the Complainant seeks to represent the interest of a third party, i.e. Kathleen S. Smith, the law is well settled that a party cannot “vindicate the rights of a third party who has the opportunity to be heard.”⁶ For these reasons, the Complaint against Windstream should be dismissed.

C. Dismissal Based on Legal Insufficiency of the Complaint, 52 Pa. Code § 5.101(a)(4).

29. Section 5.101(a)(4) permits a party to file a preliminary objection if the complaint is legally insufficient.⁷

30. In order to be legally sufficient, a complaint must set forth “an act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has the jurisdiction to administer, or of any regulation or order of the Commission.”⁸

31. The Complaint alleges no violation by Windstream of the Code,⁹ a Commission regulation, or a Commission order. The Complaint further alleges no facts that would support a finding that Windstream has violated the Code, a regulation, or an order.

32. Indeed, the Complaint’s allegations and relief sought are targeted exclusively at the scope and validity of existing easement rights outside the Commission’s jurisdiction.

⁶ *Mid-Atlantic Power Supply Ass’n v. Pa. Pub. Util. Comm’n*, 746 A.2d 1196, 1200 (Pa. Commw. Ct. 2000) (citing *Pa. Dental Ass’n v. Commw., Dep’t of Health*, 461 A.2d 329 (Pa. Commw. Ct. 1983)).

⁷ 66 Pa. C.S. § 5.101(a)(4).

⁸ 66 Pa. C.S. § 701 (emphasis supplied).

⁹ 66 Pa. C.S. §§ 101 *et seq.*

33. Even when all factual averments set forth in the Complaint are accepted as true, they do not show that Windstream violated the Code, a Commission regulation, or Commission order. Therefore, the Complaint should be dismissed against Windstream without a hearing, which would needlessly consume valuable resources of Windstream and the Commission.

D. Dismissal Based on Nonjoinder of a Necessary Party, 52 Pa. Code § 5.101(a)(5).

34. As alleged in the Complaint, Mr. Smith states that Windstream's poles are present across the subject property to provide telecommunication services to another residence on a neighboring property. Mr. Smith's complaint seeks Windstream to discontinue service to a neighboring property, allegedly because that property is "no longer in service." Complaint at 4.

35. Based on information and belief, the impacted property, Parcel No. J17-000-00071 is presently owned by a "James Diven." A copy of the publicly available tax map records of the Diven Property is provided as **Appendix C** to Windstream's New Matter.

36. Mr. Smith did not join the impacted property owners of Parcel No. J17-000-00071 to his Complaint, and there is no evidence otherwise that they have notice of Mr. Smith's request that their utility service to the property be discontinued.

37. Therefore, Mr. Smith's complaint should be dismissed as failing to join necessary parties who receive service on an adjacent parcel for which Mr. Smith wishes to terminate.

CONCLUSION

WHEREFORE, Windstream Pennsylvania, LLC, respectfully requests that the Commission (a) grant these Preliminary Objections so as to dismiss the Complaint against Windstream Pennsylvania, LLC, and (b) grant any other relief deemed appropriate.

Respectfully submitted,

/s/ Bryce R. Beard

Norman J. Kennard, Esquire (I.D. No. 26183)

Bryce R. Beard, Esquire (I.D. 325837)

Eckert Seamans Cherin & Mellott, LLC

213 Market St., 8th Floor

Harrisburg, PA 17101

(717) 237-6036 (phone)

(717) 237-6019 (fax)

nkennard@eckertseamans.com

bbeard@eckertseamans.com

Date: July 1, 2025

Counsel for Windstream Pennsylvania, LLC

Verification

I, Jodi Mohler, am the Staff Manager – Engineering for Windstream Pennsylvania LLC and I hereby state that the facts set forth in the foregoing **Preliminary Objections** are true and correct to the best of my knowledge, information and belief and that I expect Windstream 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: July 1, 2025

/s/ Jodi Mohler _____
Jodi Mohler
Staff Manager - Engineering
Windstream Pennsylvania LLC