

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

DAVID SMITH	:	
	:	C-2025-3055671
v.	:	
	:	
WINDSTREAM COMMUNICATIONS, INC.	:	

**INTERIM ORDER
DISMISSING PRELIMINARY OBJECTIONS**

On June 11, 2025, David M. Smith (Complainant) filed a formal complaint alleging that Windstream Pennsylvania, LLC (Windstream) placed poles on his property in Clearfield, Pennsylvania without an easement approval. As relief, he wants Windstream to move its poles.

On July 1, 2025, Windstream filed an Answer and New Matter. Windstream denied the material allegations in the complaint. In New Matter Windstream argues that the Commission lacks jurisdiction to adjudicate the validity and scope of easements, challenges the Complainant’s standing and that the relief requested by the Complainant would remove utility service to a neighboring property without joining the neighboring property owner. Windstream also filed preliminary objections which parallel the defenses raised in New Matter.

On July 29, 2025, the Complainant wrote a letter disputing many of the factual allegations in Windstream’s Answer and New Matter.

By notice dated August 11, 2025, the preliminary objections were assigned to me as a motion judge. As set forth in more detail below, the preliminary objections will be dismissed.

Preliminary objections are permitted under Commission regulations.¹ Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections.² The standard for consideration of preliminary objections has been repeated many times. In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible.³ All of 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.⁴ Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections.⁵

Windstream first argues that the complaint should be dismissed because the Commission does not have jurisdiction to interpret an easement. Windstream also contends that Mr. Smith's complaint is legally insufficient because it does not allege a violation of the Public Utility Code but is predicated on the interpretation of Windstream's easement rights.

Mr. Smith alleges that Windstream does not have an easement on his property. For the purposes of ruling on preliminary objections, only Mr. Smith's allegation that Windstream does not have an easement to place poles on his property must be considered true.

It is correct, as Windstream argues, that the Pennsylvania Supreme Court has held that the Commission does not have the authority to adjudicate the scope or validity of an easement.⁶ However, the Complainant contends that there is no easement. The existence of an executed and recorded right-of-way agreement is a factual matter incident to the Commission's

¹ 52 Pa. Code § 5.101.

² *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

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

⁴ *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

⁵ *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002).

⁶ *Fairview Water Co. v. Pa. PUC*, 502 A.2d 162 (Pa. 1985).

jurisdiction.⁷ Windstream's preliminary objections based on lack of jurisdiction and legal insufficiency are dismissed.

Windstream's next objection is that the complaint should be dismissed because Mr. Smith does not own the property at issue and therefore does not have standing. This allegation is predicated solely on material presented by Windstream in its Answer and New Matter. In a footnote, Windstream admits that its allegation is based on facts that are not in the complaint, but "requests that the Commission wait for the Complainant's Response to New Matter and then treat this Preliminary Objection as a Motion to Dismiss."

A request in a footnote to convert a preliminary objection to another motion with a different scope of review to cure a known procedural defect is not appropriate motion practice. This is particularly true where a complainant is unrepresented. The Commission has repeatedly expressed hesitation in ruling unfavorably against unrepresented litigants based on technical grounds.⁸ Filing improper preliminary objections instead of an appropriately supported motion for summary judgment does not serve judicial economy and is not fair to the Complainant. The preliminary objection premised on the Complainant's standing is dismissed.

Finally, Windstream seeks dismissal of the complaint because Mr. Smith failed to join an adjoining property owner. This claim is also predicated on facts alleged in New Matter rather than factual averments made in the complaint. Further, it is not clear that relocation of the poles necessarily impacts the service to another property owner. This preliminary objection will be dismissed as well.

This case presents complicated legal issues. While it is Mr. Smith's right to proceed without the benefit of counsel, he assumes some risk by doing so. Even self-represented

⁷ *E.g., Nigro v. PPL Electric Utilities Corporation*, Docket No. C-00003242 (Opinion and Order entered October 26, 2004); *Messina v. Bell Atlantic-Pennsylvania*, Docket No. C-00968225 (Opinion and Order entered September 23, 1998).

⁸ *See, e.g. Hodak v. Pennsylvania Electric Co.*, Docket No. C-2011-2274277 (Opinion and Order entered January 24, 2013).

complainants must provide relevant and necessary information.⁹ However, I believe that the parties may benefit from the assistance of a mediator in resolving their dispute rather than proceeding to a hearing. The mediator, a neutral staff member within the Mediation Unit of the Commission's Office of Administrative Law Judge, does not give advice, represent any party, evaluate or make a decision. Instead, the mediator assists the parties in their efforts to come to an agreement thereby avoiding the time, expense and uncertainty of litigation.¹⁰ Mediation is an informal process where the parties can discuss a full range of settlement options beyond those which can be ordered by the Commission in a formal adjudication. With the assistance of a mediator, the parties have more flexibility to reach creative solutions to resolve their dispute. If the dispute proceeds to a hearing, both parties must present admissible evidence in support of their claims. The result may be a decision that neither party likes nor expects.

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections by Windstream Pennsylvania, LLC are dismissed.

2. That this case is hereby referred to the Commission's Mediation Unit for the Commission's mediation review process.

Date: August 27, 2025

/s/
Mary D. Long
Administrative Law Judge

⁹ *Groch v. Unemployment Comp. Bd. of Rev.*, 472 A.2d 286 (Pa. Cmwlth 1984); *Vann v. Unemployment Comp. Bd. of Rev.*, 494 A.2d 1081 (Pa. 1985) (Self-represented litigants assume the risk of proceeding without counsel.).

¹⁰ I note that in his July 29, 2025, letter, the Complainant indicates that he has had some initial discussion with a representative from Windstream regarding the disposition of the poles.

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