**BEFORE**

**THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Duquesne Light Company filed : A-2019-3008589

Pursuant to 52 Pa. Code Chapter 57, :

Subchapter G, for Approval of the Siting and :

Construction of the 138 kV Transmission :

Lines Associated with the :

Brunot Island - Crescent Project in :

the City of Pittsburgh, McKees Rocks Borough, :

Kennedy Township, Robinson Township, :

Moon Township, and Crescent Township, :

Allegheny County, Pennsylvania. :

Application of Duquesne Light Company : A-2019-3008652

under 15 Pa.C.S. § 1511(c) for a Finding and :

Determination That the Service to be Furnished :

by the Applicant through Its Proposed Exercise :

of the Power of Eminent Domain to :

Acquire a Certain Portion of the Lands of :

George N. Schaefer of Moon Township, :

Allegheny County, Pennsylvania for the :

Siting and Construction of Transmission Lines :

Associated with the Proposed :

Brunot Island - Crescent Project Is Necessary :

or Proper for the Service, Accommodation, :

Convenience, or Safety of the Public. :

**INTERIM ORDER**

**DISMISSING PRELIMINARY OBJECTIONS TO PROTESTS FILED BY VICTORIA a. aDAMS, jOHN p. AND jENNIFER a. CROWE (306 KONTER ROAD), jOHN P. AND JENNIFER A. CROWE (1123 JUNIATA DRIVE) AND FOLEZIA A MARINKOVIC**

On March 15, 2019, Duquesne Light filed: (1) Application of Duquesne Light Company filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the 138 kV Transmission Lines Associated with the Brunot Island – Crescent Project in the City of Pittsburgh, McKees Rocks Borough, Kennedy Township, Robinson Township, Moon Township, and Crescent Township, Allegheny County, Pennsylvania, at Docket No. A-2019-3008589 (BI-Crescent Full Siting Application); and (2) Application of Duquesne Light Company Under 15 Pa.C.S. § 1511(c) For A Finding and Determination That the Service to be Furnished by the Applicant Through Its Proposed Exercise of the Power of Eminent Domain to Acquire a Certain Portion of the Lands of George N. Schaefer of Moon Township, Allegheny County, Pennsylvania for the Siting and Construction of Transmission Lines Associated with the Proposed Brunot Island – Crescent Project is Necessary or Proper for the Service, Accommodation, Convenience, or Safety of the Public, at Docket No. A-2019-3008652 (Schaefer Condemnation Application).

These applications were assigned to me and on March 28, 209, I issued a Prehearing Conference Order, which scheduled a prehearing conference for June 6, 2019. Notice of the BI-Crescent Full Siting Application and the Schaefer Condemnation Application was published in the April 6, 2019 edition of the *Pennsylvania Bulletin*. Duquesne Light also published notice of the filings in *Pittsburgh Post-Gazette* on April 15, 2019 and April 24, 2019. Proof of publication was filed with the Commission’s Secretary on April 30, 2019.

The prehearing conference was held as scheduled on June 6, 2019. Although no protests or petitions to intervene were filed, several affected landowners appeared. Duquesne Light appeared and was represented by Garret P. Lent, Esquire and Emily M. Farah, Esquire.

Following a discussion with the participants, the period of time for the filing of protests was extended. This procedure was memorialized by an interim order served on June 7, 2019, which extended the deadline for filing a protest or petition to intervene in order to become a party of record in this matter to June 21, 2019.

Timely protests were filed by, among others, [[1]](#footnote-1) Victoria A. Adams and John P. and Jennifer Crowe[[2]](#footnote-2) and Folezia A. Marinkovic [[3]](#footnote-3) On July 8, 2019, Duquesne Light filed preliminary objections, including a notice to plead, which sought to dismiss the protests of Victoria Adams and the Crowes in their entirety and claims made by Folezia Marinkovic regarding, among other things, Duquesne Light’s right-of-way and the use of her property. No Protestant filed a response to the preliminary objections, and they are now ripe for disposition.

The grounds for preliminary objection are limited:

(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.[[4]](#footnote-4)

Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections.[[5]](#footnote-5) In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible.[[6]](#footnote-6) Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections.[[7]](#footnote-7) All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections.[[8]](#footnote-8) Only those facts specifically admitted may be considered against the non-moving party.[[9]](#footnote-9) A preliminary objection which seeks dismissal of a pleading will only be granted where relief is clearly warranted and free from doubt.[[10]](#footnote-10)

In every case coming before it, the Commission must decide initially whether it has jurisdiction over the parties and the subject matter of this dispute. As a creature of legislation, the Commission possesses only the authority that the General Assembly has specifically granted to it in the Public Utility Code. That is, the Commission has only the powers expressly conferred or necessarily implied by its enabling statute.[[11]](#footnote-11) The Commission must act within and cannot exceed its jurisdiction.[[12]](#footnote-12) Jurisdiction may not be conferred by the parties where none exists.[[13]](#footnote-13) Indeed, subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy.[[14]](#footnote-14)

These protests raise a variety of issues in opposition to Duquesne Light’s BI-Crescent Full Siting Application. The protests of Victoria Adams and the Crowes related to 306 Konter Driver complain that Duquesne Light has trespassed on their property, damaged their property, express concern related to damage to their private road and roaming animals and also allege health concerns. The Crowe’s protest related to 1123 Junianta Drive adds additional claims related to the loss of timber and damage to the property caused by the construction of the project. As relief, they request Duquesne Light refrain from trespassing, repair their property, compensate them for losses and request the Commission to deny the application. Ms. Marinkovic also complains about Duquesne Light’s use of her private road, increased noise, and loss of privacy.[[15]](#footnote-15) In Duquesne Light’s view, these are private claims regarding the Protestant’s property rights and requests for damages, over which the Commission does not have jurisdiction, and Duquesne Light argues, those matters should be addressed in another tribunal.

I agree that Duquesne Light has properly articulated the law in regard to Commission jurisdiction over property disputes. The Commission does not have jurisdiction to determine the scope and validity of an easement.[[16]](#footnote-16) The Commission is similarly without jurisdiction over other real property issues such as trespass and the location of utility facilities pursuant to valid easements.[[17]](#footnote-17) The Commission also does not have authority to award damages.[[18]](#footnote-18)

The Commission has expressed a preference for permitting self-represented parties an opportunity to explain the basis of their objection to the actions of a utility rather than dismissing a pleading on procedural grounds. Further, the Protestants utilized a Commission formal complaint form which includes a specific space for requested relief. The Commission’s regulations for what is required in a protest does not include a request for relief.[[19]](#footnote-19) Therefore, to the extent that the Protestants articulate a desire to receive compensation for damage to their property or trespass, that language is viewed in the context of their opposition to the application as background for the protest.[[20]](#footnote-20) It is also not clear from the protests whether the matters complained of are disputes related to past interactions with Duquesne Light, or concerns about future interactions with Duquesne Light if the project is approved. The protests also raise health and safety issues related to the project, which may be considered by the Commission. It is not appropriate to dismiss these protests at this preliminary stage of the proceedings.

THEREFORE,

IT IS ORDERED:

That the preliminary objections to protests filed by Victoria A. Adams and John P. and Jennifer Crowe and Folezia A. Marinkovic are dismissed.

Date: July 30, 2019 /s/

Mary D. Long

Administrative Law Judge



1. Protests were also filed by Zachariah R. Nave, Joseph G. and Suzanne L. Rabosky, Aaron and Rebecca Siegel, Cynthia and Patrick Wilson, and Dennis J. and Jeanne M. Zona. Preliminary objections to these protests will be addressed in a separate order. Richard I. Gable also filed a timely protest, but no preliminary objections were filed to his protest. [↑](#footnote-ref-1)
2. John and Jennifer Crowe filed two protests: one received on June 18, 2019 related to 306 Konter Road, and a second received on June 20, 2019 related to 1123 Juanita Drive. [↑](#footnote-ref-2)
3. Collectively, Protestants. [↑](#footnote-ref-3)
4. 52 Pa.Code § 5.101(a). [↑](#footnote-ref-4)
5. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). [↑](#footnote-ref-5)
6. *Dept. of Auditor General v. SERS*, 836 A.2d 1053, 1064 (Pa.Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm’n*, 669 A.2d 1105 (Pa.Cmwlth. 1996). [↑](#footnote-ref-6)
7. *Boyd v. Ward*, 802 A.2d 705 (Pa.Cmwlth. 2002). [↑](#footnote-ref-7)
8. *County of Allegheny v. Commw. of Pa.,* 490 A.2d 402 (Pa. 1985); *Pennsylvania State Lodge, Fraternal Order of Police v. Dept. of Conservation and Natural Resources*, 909 A.2d 413 (Pa.Cmwlth. 2006), *aff’d per curium*, 924 A.2d 1203 (Pa. 2007); *see also Glod v. PECO Energy Company*, Docket No. C-2012-2305158 (Interim Order dated July 2, 2012). [↑](#footnote-ref-8)
9. *Ridge v. State Employees’ Retirement Board*, 690 A.2d 1312 (Pa.Cmwlth. 1997). [↑](#footnote-ref-9)
10. *Interstate Traveller Services, Inc. v. Pa. Department of Environmental Resources*, 406 A.2d 1020 (Pa. 1979); *Application of K&F Medical Transport*, LLC, PUC Docket No. A-2008-2020353 (Initial Decision dated April 25, 2008). [↑](#footnote-ref-10)
11. *Feingold v. Bell of Pa*., 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 237 A.2d 602 (Pa. 1967). *See also* [*Department of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982),](https://www.lexis.com/research/buttonTFLink?_m=fb36d71eaa374be644e353b4fbc1863f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2001%20E.H.B.%20542%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=7&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b454%20A.2d%201%2cat%204%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=6&_startdoc=1&wchp=dGLbVzS-zSkAW&_md5=e20f6886d0323b5ad633b815ecc72d47) and [*Pequea Township v. Department of Environmental Protection*, 716 A.2d 678, 686 (Pa.Cmwlth. 1998).](https://www.lexis.com/research/buttonTFLink?_m=fb36d71eaa374be644e353b4fbc1863f&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2001%20E.H.B.%20542%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=8&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b716%20A.2d%20678%2cat%20686%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=6&_startdoc=1&wchp=dGLbVzS-zSkAW&_md5=9fa7b1747ae10b93392092855f589b7b) [↑](#footnote-ref-11)
12. *City of Pittsburgh v. Pa. P.U.C*., 43 A.2d 348 (Pa.Cmwlth. 1945). [↑](#footnote-ref-12)
13. *Roberts v. Matorano*, 235 A.2d 602 (Pa. 1967). [↑](#footnote-ref-13)
14. *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. 1992), *alloc. den.,* 637 A.2d 293 (1993). [↑](#footnote-ref-14)
15. Ms. Marinkovic also complains that she did not receive proper notice of the application. Duquesne Light does not seek dismissal of this claim by preliminary objection. [↑](#footnote-ref-15)
16. *Fairview Water Company. v. Pa. Pub. Util. Comm’n*, 502 A.2d 162 (Pa. 1985) (“…the PUC does not have jurisdiction to determine the scope and validity of an easement. Once there has been a determination by the PUC that the proposed service is necessary and proper, the issues of scope and validity and damages must be determined by a Court of Common Pleas exercising equity jurisdiction.”). [↑](#footnote-ref-16)
17. *See Shedlosky v. Pennsylvania Electric Co*., Docket No. C-20066937 (Order entered May 28, 2008); *see also Perrige v. Metropolitan Edison Co*., Docket No. C-00004110 (Order entered July 11, 2003) (Commission had no jurisdiction to interpret the meaning of a written right-of-way agreement); *Messina v. Bell Atlantic-Pennsylvania, Inc.*, Docket No. C-00968225 (Order entered Sept. 23, 1998) (“The Commission has clearly stated in prior decisions that it is without subject matter jurisdiction to adjudicate questions involving trespass and whether or not utility facilities are located pursuant to valid easements or rights-of-way.” (citation omitted)). [↑](#footnote-ref-17)
18. See *Re Philadelphia Electric Company*, 1992 Pa. PUC LEXIS 160 (Initial Decision dated June 29, 1992); *see also Re Philadelphia Electric Company*, 52 Pa. P.U.C. 198, 1978 Pa. PUC LEXIS 141 (Order dated May 17, 1978) and *Re West Penn Power Company*, 68 Pa. P.U.C. 262, 268, 1988 Pa. PUC LEXIS 462 (Order dated Oct. 3, 1988). [↑](#footnote-ref-18)
19. 52 Pa.Code § 5.52. [↑](#footnote-ref-19)
20. 52 Pa.Code § 1.2 (the Commission may overlook and error or defect of procedure). However, the Protestants are cautioned that going forward they are expected to inform themselves and make appropriate efforts to be aware of the Commission’s regulations. [↑](#footnote-ref-20)