

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

PR BEAVER VALLEY LIMITED PARTNERSHIP,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
	:	
Appellant	:	
	:	
v.	:	
	:	
DUQUESNE LIGHT COMPANY,	:	
	:	
Appellee	:	No. 912 WDA 2008

Appeal from the Order entered May 2, 2008  
In the Court of Common Pleas of Beaver County  
Civil No.: 10088 of 2008

BEFORE: BENDER, SHOGAN and FITZGERALD\*, JJ.

MEMORANDUM: FILED: MAY 17, 2010

Appellant, PR Beaver Valley Limited Partnership, appeals from the order entered in the Beaver County Court of Common Pleas. We reverse in part and remand.

The trial court adequately summarized the facts and procedural posture of this case:

This case involves the electrical service provided to the Beaver Valley Mall, Center Township, Beaver County, Pennsylvania.

On June 23, 1969, Duquesne Light Co. (DLC) agreed with Beaver Valley Mall (BVM) to ". . .install, own and maintain, at its sole cost and expense, all primary cable switches and power transformers on the subject land. . .," i.e., "primary lines."

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\* Former Justice specially assigned to the Superior Court.

The Agreement also provided all secondary wiring, equipment and facilities in the BVM would be constructed and installed by the BVM, i.e., "secondary wiring." DLC reimbursed BVM for the cost and expense of the "secondary wiring" and was transferred title to the secondary wiring, equipment and other electrical facilities.

On September 26, 2007, DLC gave notice to terminate the Agreement and to transfer ownership of "all facilities" to the BVM including the revised right-of-way agreements. Subsequently, DLC agreed only to terminate and transfer title to the secondary lines and agreed to own and maintain the primary lines.

The BVM claims that DLC has no right to terminate under the agreement.

DLC claims that it has the right to terminate the agreement pursuant to the 1969 Electric Service Tariff, Section 9.1 ("Tariff") Fourth Revised, as justified by electric service revenues to be obtained at the BVM.

On January 9, 2008, the BVM filed a Declaratory Judgment Action requesting the court to determine the rights of the BVM and the obligations of DLC under the original agreement of June 23, 1969.

On May 2, 2009, [the trial] court granted the Preliminary Objections filed by DLC and relinquished jurisdiction to the Public Utility Commission.

[The trial] Court relied on ***Elkin v. Bell Telephone Company of Pennsylvania***, [491 Pa. 123], 420 A.2d 371, (1980), due to the question of the revenues of electrical service provided to the BVM and the regulations of the Public Utility Commission involving the interpretation of a tariff and the assessment of the cost of the service relative to the rate of return.

These issues are not issues with which this Court is familiar.

On these bases, [the trial] Court granted the preliminary objections of DLC and relinquished jurisdiction to the Public Utility Commission.

Trial Ct. Op., 7/18/08, at 1-2.

Appellant raises the following issues for our review:

Whether the trial court erred as a matter of law in sustaining [Appellee's] Preliminary Objections, relinquishing its inherent jurisdiction over this contract dispute between private parties, and ordering a transfer of the case to the PUC, where this case does not involve: (a) the adequacy, efficiency, safety, reasonableness or rates of electrical service provided to [Appellant] (or to the general public); (b) administrative policy or PUC regulations; and (c) does not require utilization of the special expertise of the PUC?

Whether the trial court erred as a matter of law in finding that a 1969 tariff (the "Tariff") was relevant and applicable to this dispute, requiring referral to the PUC, where the Tariff was not incorporated into the parties' contract, and where a complete copy of the Tariff was not provided to the trial court or to [Appellant].

Appellant's Brief at 4.

Appellant contends the trial court erred in relinquishing jurisdiction in the case *sub judice* and in transferring the matter to the PUC. Appellant argues that the transfer of this case to the PUC was improper because it is a private contract dispute concerning whether Appellee has the right to terminate the June 23, 1969 agreement, a matter properly decided by the trial court.

In the complaint, Appellant avers, *inter alia*,

1. [Appellant] PR Beaver Valley LP ("PR Beaver Valley"), is the owner of the Beaver Valley Mall and the property on

which it is situated (hereinafter, "mall") in Center Township, Pennsylvania, and is the successor in interest to, inter alia, Beaver Valley Mall, Inc., William F. Sullivan, and Rosemary Sullivan.

\* \* \*

10. Thus, at present and pursuant to the Agreement, [Appellee] owns all primary and secondary lines to the Mall property up to and including the load side of the meter or current transformer for each customer of [Appellee] in the shopping mall.

11. There is no provision in the Agreement providing [Appellee] with a right to terminate the Agreement

12. There is no provision in the Agreement which would allow [Appellee] to discontinue its obligation to own and maintain the primary and secondary lines.

\* \* \*

14. [Appellee] has since clarified that it is seeking to transfer ownership of only the secondary lines to [Appellant], and that it will continue to own and maintain the primary lines.

\* \* \*

26. It is believed that the reason that [Appellee] seeks to terminate the Agreement is not because its electric service revenues are insufficient but because of the potential cost of repairs to and maintenance of the largely original 1969 secondary lines.

\* \* \*

29. Due to the age of the lines (in some cases forty (40) years old), it is further believed that such lines may need to be completely replaced in the near future at a very substantial cost.

30. Moreover, [Appellee] cannot effectuate a transfer of title to the secondary lines to [Appellant] by the mere expediency of termination of the Agreement.

31. [Appellee] alone is the rightful owner of both the primary and secondary lines.

Appellant's Complaint, 1/8/08, at 1-3, 5-6. Appellant seeks a declaratory judgment declaring Appellant's rights and Appellee's obligations under the Agreement. Appellant requested the court to declare that Appellee cannot terminate the Agreement and must continue to maintain and repair the primary and secondary lines at the mall. Further, Appellant contends Appellee cannot transfer title to the primary and secondary lines by termination of the Agreement. Appellant concludes that the trial court erred in transferring the matter to the PUC. Appellant is entitled to partial relief.

Appellee, as a public utility, is required to file tariffs with the PUC. The interpretation of the tariff is relevant to the issue of whether Appellee can terminate the agreement. Pursuant to the 1969 Electric Service Tariff, Section 9.1 ("Tariff") Fourth Revised, Appellee contends that it has the right to terminate the Agreement.

Instantly, the doctrine of primary jurisdiction is dispositive of whether the trial court erred in granting Appellee's preliminary objections and relinquishing jurisdiction to the PUC. The Pennsylvania Supreme Court defined the doctrine:

In general, the doctrine of primary jurisdiction holds that where an agency has been established to handle a particular class of claims, the court should refrain from

exercising its jurisdiction until the agency has made a determination. Hence, although the court may have subject-matter jurisdiction, the court defers its jurisdiction until an agency ruling has been made.

**Jackson v. Centennial School District**, 509 Pa. 101, 107, 501 A.2d 218, 221 (1985) (citations omitted).

In **Ostrov v. I.F.T., Inc.**, 586 A.2d 409 (Pa. Super. 1991), this Court explained:

Thus, the doctrine of primary jurisdiction applies where the administrative agency cannot provide a means of complete redress to the complaining party and yet the dispute involves issues that are clearly better resolved in the first instance by the administrative agency charged with regulating the subject matter of the dispute.

\* \* \*

Thus, **Elkin [v. Bell Telephone Co. of Pennsylvania]**, 491 Pa. 123, 420 A.2d 371 (1980)] established that in a case where the issues raised merit referral to an agency, but the agency cannot provide complete relief, the proper procedure is bifurcation of the action. The trial court must stay the action pending before it and refer to the administrative agency those issues over which the agency has primary jurisdiction. Those issues must then be decided by the agency. The action then proceeds in the trial court where remaining issues within the purview of the court are decided and appropriate relief is granted. **Id.** at 131-35, 420 A.2d at 376-77.

**Id.** at 414. "Matters relating to tariff, necessity of equipment, deposits and use of various types of services are within the particular expertise of the PUC." **Optimum Image, Inc. v. Philadelphia Elec. Co.**, 600 A.2d 553, 557 (Pa. Super. 1991).

The instant case requires a bifurcated proceeding. **See Ostrov, supra.** In **Adams v. Pub. Util. Comm'n**, 819 A.2d 631 (Pa. Commw. 2003), “[p]etitioners filed a Petition for Declaratory Order with the PUC on August 28, 2001, seeking to compel Columbia Transmission and Columbia Gas to continue to deliver natural gas to them or to provide substitute service.” **Id.** at 633. The Commonwealth Court found that this dispute should be decided by the trial court because “the PUC lacks jurisdiction over private contractual disputes.” **Id.** at 635.<sup>1</sup> Similarly, in the case *sub judice*, the issue of whether Appellee can terminate the agreement is properly before the trial court. However, the issue regarding the tariff should be decided by the PUC, an issue over which it has primary jurisdiction.

Therefore, the trial court must stay the action pending before it and refer to the PUC the issue regarding the applicability of the tariff. Once the PUC has decided that issue, the action will then proceed in the trial court for resolution of the issue of whether Appellee can terminate the agreement.

**See Optimum Image, Inc., supra.**

Order reversed in part. Case remanded. Jurisdiction relinquished.

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<sup>1</sup> We note “[a]lthough decisions of the Commonwealth Court are not binding on this Court, we frequently turn to the decisions of our colleagues for guidance.” **See Abbott v. Schnader, Harrison, Segal & Lewis, LLP**, 805 A.2d 547, 556 n.10 (Pa. Super. 2002).

J. A30035/09

Judgment Entered:

Eleanor K. Valecko

Deputy Prothonotary

DATE: May 17, 2010