

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PR BEAVER VALLEY LIMITED	)	
PARTNERSHIP,	)	No. C-2010-2192141
	)	
Complainant,	)	
	)	
v.	)	
	)	
DUQUESNE LIGHT COMPANY,	)	
	)	
Respondent.	)	

**COMPLAINANT’S BRIEF IN OPPOSITION TO RESPONDENT’S  
MOTION FOR LEAVE TO FILE AMENDED RESPONSE TO COMPLAINT**

Complainant, PR Beaver Valley Limited Partnership (“PR Beaver Valley”), files this response in opposition to Respondent Duquesne Light Company’s (“DLC”) Motion for Leave to File Amended Response to Complaint (“Motion to Amend”):

**I. INTRODUCTION**

This case has been in the courts for nearly three years. The genesis of this dispute began in September 2007, when DLC sent PR Beaver Valley a letter indicating that it was unilaterally terminating a June 23, 1969 Agreement (“Agreement”) between the parties pursuant to which DLC was required to own and maintain the primary and secondary electrical lines at the Beaver Valley Mall (the “Mall”) owned by PR Beaver Valley. The stated basis of the termination was that the cost of the contract was no longer justified by the revenues to be obtained at the Mall pursuant to the terms of a 1969 Tariff not otherwise incorporated into the Agreement. PR Beaver Valley filed a Declaratory Judgment Action in the Court of Common Pleas of Beaver County, seeking a declaration that DLC had breached or anticipatorily breached the contract, and that DLC continued to own the electrical lines. DLC filed preliminary objections seeking a

transfer of the case to the PUC. The Court of Common Pleas ordered that the case be transferred to the PUC.

PR Beaver Valley appealed that decision and the Superior Court of Pennsylvania reversed in part, ordering a bifurcated proceeding, with the PUC to determine “the issue of the applicability of the 1969 Tariff” and the Court of Common Pleas to determine whether DLC may terminate the Agreement. Accordingly, consistent with the Pennsylvania Superior Court’s Order and on the Order of the Court of Common Pleas of Beaver County on remand, on August 5, 2010, PR Beaver Valley filed a very narrow Complaint with this Tribunal seeking a declaratory judgment that the 1969 Tariff does not apply to this dispute. There are no other issues before this Tribunal.

In response to the Complaint, DLC filed a Response in effect obviating the Superior Court decision and asserting (incorrectly) that the issue before the PUC is “not whether the October 1969 tariff applies to this matter, but what effect the application of the tariff has on this matter.” Response at ¶ 11. DLC now seeks to amend its Response by raising new defenses which were not raised in the Court of Common Pleas or the Pennsylvania Superior Court. DLC now seeks to rely on the current tariff to terminate the Agreement because according to DLC the current tariff provides a source of termination if DLC can show that PR Beaver Valley tampered or interfered with its equipment and facilities. (Motion to Amend, Ex. A, Respondent’s Amended Response to Complaint, ¶ 1). Further, DLC contends that the current tariff does not permit DLC to enter into agreements to own secondary lines because such ownership operates as an unreasonable preference. *Id.* DLC now states that the issue before the PUC is which tariff applies to this matter and the effect of the tariff on the Agreement. *Id.* at ¶ 11. Clearly, DLC

could have raised these arguments when it attempted to terminate the Agreement via letter dated September 26, 2007, as well as throughout the past three years of litigation, but failed to do so.

Indeed, at no point in any of the prior proceedings did DLC contend that it had a right to terminate the Agreement pursuant to the terms of the current tariff now in effect or due to PR Beaver Valley's alleged tampering with its facilities. DLC now, however, seeks to amend its Response in this action to allege these defenses for the first time, despite the fact that neither the Court of Common Pleas nor the Superior Court considered these defenses and whether they required the PUC's expertise and a bifurcated proceeding. PR Beaver Valley has incurred significant attorneys' fees and costs in litigating DLC's initial defense, *i.e.*, that the 1969 Tariff applied and that the cost of the contract was no longer justified by the revenues to be obtained, and has arrived at this Tribunal on the basis of this defense. DLC has waived and should be judicially estopped from asserting new defenses after three (3) years of litigation, particularly where PR Beaver Valley was unable to argue before either the Court of Common Pleas or the Superior Court that these defenses do not require adjudication before this Tribunal. Indeed, the Court of Common Pleas is perfectly capable of determining whether PR Beaver Valley tampered with DLC's facilities. In addition, the current tariff does not abrogate the 1969 Agreement. The 1969 Agreement was expressly permitted pursuant to the 1969 Tariff, and there is nothing in the current tariff which prohibits or nullifies the 1969 Agreement. As such, amendment on this basis would be futile. Finally, neither the Pennsylvania Superior Court's Order nor the Complaint filed by PR Beaver Valley request a determination by this Tribunal as to whether the current tariff applies to this dispute. As such, this question is simply not before this Tribunal and on this basis alone, amendment should not be permitted.

## II. PROCEDURAL HISTORY

On January 9, 2008, PR Beaver Valley commenced this declaratory judgment action by filing a Complaint in the Court of Common Pleas of Beaver County. PR Beaver Valley sought a declaratory judgment on the following issues: (1) that DLC had anticipatorily breached the Agreement, by indicating that it would terminate the Agreement; and (2) that DLC continued to own the primary and secondary electrical lines at PR Beaver Valley, and its ownership of the lines could not be transferred to PR Beaver Valley through the simple expedient of terminating the Agreement. On February 26, 2008, DLC filed Preliminary Objections to PR Beaver Valley's Complaint. DLC argued that the trial court lacked jurisdiction over the matter and that the case should be transferred to the PUC on the basis of the 1969 Tariff (in effect at the time of the Agreement) and "an assessment of the cost of the service relative to the rate of return."

Specifically, DLC argued in its brief at the trial court the following:

Plaintiff Beaver Valley's Complaint involves a contract for the construction, maintenance, and provision of utility services. More importantly, it involves issues that require the interpretation of *the tariff*, and an assessment of the cost of the service relative to the rate of return.

....

*This matter implicates the tariff filed by DLC at the time of the Agreement and has a direct impact on the interpretation of the contract between the parties. The tariff involved in this case is the one in existence at the time the Agreement was entered into in 1969. The necessity of understanding and interpreting this thirty-nine (39) year old tariff is one which mandates the special expertise of the PUC.*

....

Furthermore, the Agreement incorporates the terms of a *thirty nine (39) year old DLC tariff*. Complaint at Exhibit 1. . . . [T]he issues presented involve an examination of *the tariff*. . . . The resolution of these issues therefore requires the special expertise of the PUC.

(DLC's Br. Supp. Prelim. Objs., pp. 3-5) (emphasis supplied) (relevant portion attached hereto as Ex. 1). *DLC did not argue (as it now seeks to do) that the terms of the Tariff presently in effect governed this dispute or any aspect of it, or that PR Beaver Valley had tampered with its facilities.*

In response to DLC's arguments, PR Beaver Valley argued that the terms of the 1969 Tariff were not incorporated into the Agreement and that that Tariff did not apply to this dispute or provide a source of termination rights:

[I]nterpretation of paragraph 6 of the Agreement does not require utilizing the PUC's special experience and expertise, since the issue is not complex and the Court is overwhelmingly familiar with issues and standards governing contract interpretation. The essence of the Complaint is whether paragraph 6 of the Agreement provides DLC with a right to terminate the Agreement. *Paragraph 6 does not, by its plain words, refer or relate to the 1969 Tariff.*

....

DLC filed its Tariff in 1969 and apparently based its decision to enter the Agreement on such Tariff, i.e., "if (a) in the Company's judgment the cost of so doing is justified by the revenues to be obtained." (Tariff, page 6, § 9.1). A determination of the rights of the parties under paragraph 6 of the Agreement does not and will not invoke the reasonableness of the 1969 Tariff or require the special expertise of the PUC.

(PR Beaver Valley's Br. Opp'n Prelim. Objs., pp. 10-11) (relevant portion attached hereto as Ex. 2). *PR Beaver Valley did not discuss, nor did it have occasion to discuss, the terms of the Tariff presently in effect.*

On May 2, 2008, the trial court sustained DLC's Preliminary Objections, and ordered that the case be transferred to the PUC. (Order dated May 2, 2008) (attached hereto as Ex. 3).

On May 23, 2008, PR Beaver Valley filed a Notice of Appeal with the Pennsylvania Superior Court, appealing the trial court's May 2, 2008 Order directing a transfer of the case to the PUC.

On July 18, 2008, the trial court issued an Opinion in support of its May 2, 2008 Order, reasoning as follows:

This Court relied on **Elkin v. Bell Telephone Company of Pennsylvania**, 420 A.2d 371,1 (1980), due to the question of the revenues of electrical service provided to the [mall] 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 [referenced in the 1969 tariff].

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

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

(Op., p. 2) (emphasis added) (attached hereto as Ex. 4).

On appeal, PR Beaver Valley argued to the Superior Court that the 1969 Tariff did not apply to the parties' dispute and was not incorporated into the parties' Agreement. (Br. Appellant PR Beaver Valley, pp. 18-21) (relevant portions attached hereto as Ex. 5). PR Beaver Valley did not discuss, nor did it have any reason to discuss, the terms of the current tariff or whether the terms of the current tariff provided a source of termination rights.

DLC again argued to the Superior Court that "this lawsuit . . . requires the interpretation of Duquesne Light's [1969] tariff referenced in the Agreement between the parties." (Br. Appellee DLC, p. 9) (relevant portion attached hereto as Ex. 6). DLC quoted the terms of the 1969 Tariff. It further argued in its appellate brief that

the entire contract should be read as a whole and every part of it taken into consideration and given effect. Accordingly, it is clear that Duquesne Light was to own and maintain all electrical wiring, equipment and other facilities in the Mall for each of Duquesne Light's customers pursuant to Rule 9.1 of Duquesne Light's [1969] filed tariff.

*Id.* at 13 (emphasis added).

The Superior Court found that the case "requires a bifurcated proceeding." (Mem. dated May 17, 2010, p. 7) (attached hereto as Exhibit 7). The Superior Court thus ordered the trial

court to “stay the action pending before it and refer to the PUC the issue regarding the applicability of the tariff.” Of course, the only tariff which was discussed by the Superior Court was the 1969 Electric Service Tariff. The Superior Court made no reference to the current tariff because DLC never raised the applicability of the current tariff. On August 5, 2010, PR Beaver Valley, pursuant to the Orders of the Pennsylvania Superior Court and the Court of Common Pleas, filed its Complaint with this Tribunal, seeking a declaratory judgment that the 1969 Tariff does not apply to this dispute. There was no request that this Tribunal determine whether any other tariff applies and/or whether DLC has a right to terminate the Agreement for any other reason.

### **III. FACTS**

PR Beaver Valley is the owner of the Beaver Valley Mall and the property on which it is situated (hereinafter, the “Mall”) in Center Township, Pennsylvania, and is the successor in interest to, among others, Beaver Valley Mall, Inc., William F. Sullivan, and Rosemary Sullivan. (Compl., ¶ 12(a)). On or about June 23, 1969, DLC and the predecessors in interest to PR Beaver Valley entered into an Agreement pursuant to which DLC agreed to “install, own and maintain, at its sole cost and expense, all primary cable, primary switches and power transformers on the subject land, except that Beaver Valley shall provide all necessary trenching and backfilling for the primary cable.” (Agreement, attached to the Complaint as Ex. C and attached hereto as Ex. 8, ¶ 2, p. 2) (the primary cable, primary switches and power transformers will hereinafter be referred to as “primary lines”). Beaver Valley Mall, Inc. provided the necessary trenching and backfilling for the primary cable. (Compl., ¶ 12(b)).

With respect to the secondary wiring, equipment, and facilities (“secondary lines”), the Agreement provides that Beaver Valley Mall, Inc. would construct and install such secondary

wiring, equipment, and facilities, DLC would reimburse Beaver Valley Mall, Inc. for the same, and “within ninety (90) days from the date of written notification of completion to [DLC], . . . Beaver Valley and [the Sullivans] shall . . . execute and deliver a bill of sale evidencing the transfer of title to all of such wiring, equipment, or other facilities to [DLC], free and clear of any security interest in or other lien or encumbrance on such facilities.” (Ex. 8, ¶ 3). Beaver Valley Mall, Inc. and the Sullivans *transferred title* to the secondary wiring, equipment, and other facilities to DLC. (Compl., ¶ 12(d)). As a result, at present and pursuant to the Agreement, DLC *owns* all primary and secondary lines to the Mall property. (Compl., ¶ 12(d)).

As a result of the Agreement, DLC obtained the Mall and its tenants as customers, and enjoyed the fruits of that arrangement for many, many years. In fact, DLC continues to enjoy the fruits of that Agreement to this day. The Agreement has remained in place for over forty years, with DLC owning the primary and secondary lines and on occasion repairing them as needed. However, the largely original primary and secondary lines are aging, and they have required more frequent repairs and may soon need replacement. (Compl., ¶ 12(b)).

Via letter dated September 26, 2007, DLC gave notice of its intent to terminate the Agreement.<sup>1</sup> (Compl., ¶ 12(g)). In that regard, DLC enclosed revised Right-of-Way Agreements “for signature by the Mall owners.” *Id.* After enjoying the fruits of the Agreement for nearly forty years, DLC sought to terminate the Agreement on the purported basis that the revenues from the Mall no longer justified the Agreement. (Compl., ¶ 12(f)). It is believed that the real reason that DLC sought to terminate the Agreement is due to the anticipated costs associated with repairing and/or replacing the largely original primary and secondary lines. (Compl., ¶¶ 12(p)).

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<sup>1</sup> DLC subsequently clarified that it is seeking to transfer ownership of only the secondary lines to PR Beaver Valley, and that it will continue to own and maintain the primary lines. (Compl., ¶ 14).

In any event, DLC claimed that it had a right to terminate the Agreement pursuant to Paragraph 6 thereof, which provides as follows:

All wiring, equipment and other facilities installed by Duquesne or purchased by it pursuant to Paragraph 3 hereof shall remain the property of Duquesne, and upon demolition or destruction of the shopping mall or upon termination of this Agreement for any cause, Duquesne shall have the right to remove the same; provided, however, that in the event of the proposed demolition of the shopping mall, Beaver Valley or Owners shall give Duquesne written notice thereof at least sixty (60) days prior to the scheduled date of the proposed demolition and shall afford Duquesne a reasonable opportunity for removing its facilities prior to such date.

(Ex. 8, ¶ 6, p. 5). DLC now claims—for the first time after three years of litigation—that it has the right to terminate the Agreement based on the current tariff and Rule 34, which provides in relevant part as follows: “The Company may terminate electric service and remove its equipment from the premises in case the Company’s property on the premises has been interfered with, or in the case evidence is found that the service wires, meters, switch-box or other appurtenances on the premises have been tampered with.” (Duquesne Light Schedule of Rates (“Tariff”), relevant portions attached hereto as Ex. 9, ¶ 34). The Agreement itself, which has obviously been available to DLC since the beginning of the dispute, contains a similar provision:

Neither Beaver Valley nor Owners shall in any way or manner repair, adjust, tamper or otherwise interfere with Duquesne’s wiring, equipment and other facilities, or the use or operation thereof, on the subject land or in said shopping mall, nor shall Beaver Valley or Owners suffer or permit any of their contractors, employees, agents, tenants, licensees, invitees or any other person or persons to repair, adjust, tamper or interfere with such facilities.

(Ex. 8, ¶ 8). In addition, the 1969 Tariff (in place at the time of the parties’ Agreement) also contained a similar provision, also numbered Rule 34: “The Company may shut off the supply of electric service and remove its equipment from the premises upon reasonable notice in case

the Company's property on the premises has been interfered with, or in case evidence is found that the service wires, meters, switch-box or other appurtenances on the premises have been tampered with." (1969 Tariff, relevant portion attached hereto as Ex. 10). Yet DLC did not raise this provision at any time until the Motion to Amend was filed. Nor does DLC describe the alleged tampering or point out when this alleged tampering occurred. Nor does DLC contend that new facts have arisen since the time of filing its original Response which would warrant the assertion of this new defense. In essence, DLC wishes to jettison its obligations under the Agreement with respect to the secondary lines while continuing to enjoy the fruits of its ownership of the primary lines—an ownership which was conveyed forty years ago with consideration given to DLC.

#### **IV. LEGAL ARGUMENT**

##### **A. Whether the Current Tariff Applies and Whether There was Tampering with DLC's Facilities is Not Properly Before the PUC**

The Superior Court and the Court of Common Pleas transferred this dispute to the PUC to determine a very narrow issue: the applicability of the 1969 Tariff. This Tariff was the only tariff which was discussed by either Court, and it was the only tariff which DLC cited in support of its position that it has a right to terminate the Agreement and that the matter should be transferred here as requiring the special expertise of the PUC. As required by the Superior Court's ruling, and the Court of Common Pleas Order on remand,<sup>2</sup> PR Beaver Valley filed a very narrow Complaint before this Tribunal, seeking a determination of whether the 1969 Tariff applies to this dispute. DLC seeks to not only amend its Response, but also to expand the scope of the dispute, to include the effect of the current Tariff on this dispute and whether it gives DLC a right to terminate the parties' Agreement on the basis of PR Beaver Valley allegedly tampering

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<sup>2</sup> On May 18, 2010, the Court of Common Pleas ordered, in relevant part, "This case is referred to the PUC on the issue of the applicability of the tariff."

with DLC's facilities. The Complaint on file does not seek such a declaration from this Tribunal, and more importantly, DLC's request exceeds the scope of the Superior Court's mandate.<sup>3</sup> For this reason alone, the Motion to Amend should be denied.

**B. DLC is Judicially Estopped from Asserting, and Has Waived, Its Tampering Defense Allegedly Based on the New Tariff**

DLC is judicially estopped from asserting a new defense (*i.e.*, that PR Beaver Valley tampered with its equipment in violation of the parties' Agreement and the current tariff), when it successfully asserted another defense (*i.e.*, that the PUC's expertise is required to determine the applicability of the 1969 Tariff), as the basis of having this case transferred to this Tribunal. "As a general rule, a party to an action is estopped from asserting a position inconsistent with his or her assertion in a previous action, if his or her contention was successfully maintained." *In re Adoption of S.A.J.*, 838 A.2d 616, 620 (Pa. 2003) (citation omitted). Indeed, the courts "have long applied this principle of estoppel where litigants 'play fast and loose' with the courts by switching legal positions to suit their own ends." *Trowbridge v. Scranton Artificial Limb Co.*, 747 A.2d 862, 865 (Pa. 2000) (quoting *Ligon v. Middletown Area Sch. Dist.*, 584 A.2d 376, 380 (Pa. Commw. Ct. 1990)). "The purpose of this doctrine is to uphold the integrity of the courts by 'preventing parties from abusing the judicial process by changing positions as the moment requires.'" *Id.* (citing *Gross v. City of Pittsburgh*, 686 A.2d 864, 867 (Pa. Commw. Ct. 1996)). This doctrine applies to prevent a party from switching positions within the same action or in

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<sup>3</sup> DLC relies on *Bell Tel. Co. of Pa. v. Pennsylvania Pub. Util. Comm'n*, 417 A.2d 827 (Pa. Commw. Ct. 1980), to support its argument that the current tariff applies. *Bell Telephone*, however, is inapposite because the Court held that the telephone tariff in effect when the telephone customer received new service governed the charges (*i.e.* rates) for establishment of that service. The Court reasoned that there can be no lawful rate except the last tariff published as provided by law and contracts fixing rates are superseded by the rate in effect at the time the service is delivered. *Bell Tel.*, at 828-29. The instant dispute does not involve new service or the rates which govern the service provided to the Mall. As such, DLC's reliance on *Bell Telephone* is misplaced and it does not mandate that the current tariff applies to this dispute. Rather, it is the Agreement which governs this dispute and the viability of the Agreement is to be determined at the time the parties entered into such Agreement. *See Part IV.D supra.*

related proceedings. *See, e.g., Ligon*, 584 A.2d at 380 (citing *Selected Risks Ins. Co. v. Kobelinski*, 421 F. Supp. 431 (E.D. Pa. 1976)).

Here, DLC successfully maintained that the PUC's expertise was required to determine the applicability of the 1969 Tariff to this dispute. DLC did not argue that PR Beaver Valley tampered with its facilities allegedly in violation of the parties' Agreement and the current tariff, as it does now. Had it done so in the prior proceedings, PR Beaver Valley would have (in addition to denying the allegations) argued that the PUC's expertise was not required, particularly where the parties' Agreement addresses this very issue and prohibits tampering with DLC's facilities. Now that DLC has successfully secured the venue of its choosing, taking full advantage of its prior position, it should not be permitted to seek a second advantage by taking an incompatible position, by asserting a defense which the Court of Common Pleas is more than capable of adjudicating. Judicial estoppel prevents this result, and DLC's Motion for Leave to Amend should be denied for this reason. *See, e.g., In re Adoption of S.A.J.*, 838 A.2d at 620; *Trowbridge*, 747 A.2d at 865.

**C. DLC Should Not Be Permitted to Amend its Pleadings Pursuant to 52 Pa. Code § 5.91 and § 5.92 Where PR Beaver Valley Will be Prejudiced**

Amendments to the pleadings will only be permitted if they "comply with the requirements of this subchapter relating to the pleading amended." 52 Pa. Code § 5.91. 52 Pa. Code § 5.92 prohibits an amendment following an objection if it "prejudice[s] the public interest or the rights of a party." Here, as articulated more fully in Part IV.B. above, PR Beaver Valley is prejudiced by DLC raising a new defense for the first time before this Tribunal, as it had no opportunity to argue before either the Court of Common Pleas or the Superior Court that the Court of Common Pleas was capable of adjudicating the tampering defense which DLC now asserts. For this Tribunal to consider this defense at this juncture is wholly prejudicial to PR

Beaver Valley. Moreover, DLC is not prejudiced by the denial of this Motion, as it will have an opportunity to raise the tampering defense before the Beaver County Court of Common Pleas upon transfer of the case to that Court, which is to determine, pursuant to the Superior Court's Order, whether DLC has a right to terminate the Agreement.

**D. DLC's Motion to Amend Should be Denied as Futile, as the Contract is Not Prohibited Under the New Tariff and the Tampering Defense Should be Decided by the Court of Common Pleas**

DLC appears to be arguing that the current tariffs prohibit or invalidate the parties' Agreement because the "current tariffs do not provide for Duquesne Light ownership and maintenance of secondary lines." (Motion to Amend, Ex. A, Respondent's Amended Response to Complaint, ¶ 1). However, viability of a contract is determined at the time that it is entered into, and "[a] contract that is valid when made is generally not affected by a change in the public policy of the state when there is no express intent by the legislature to make the act retroactive." 17 C.J.S. Contracts § 29 (footnote/citation omitted). Here, the current tariff says nothing about agreements such as the parties' Agreement here. It certainly does not prohibit such agreements. In fact, although there is no Section 9.1, as in the 1969 Tariff, there is a similar concept permitting "special contracts" with industrial and commercial customers:

The Company at its sole discretion may enter into special contracts for electric service with industrial or commercial customers having load of at least 100 kW . . . . Terms and conditions of service will be mutually agreed upon by the Company and the customer and included in a signed contract . . . .

(Duquesne Light Schedule of Rates ("Tariff"), Ex. 9, ¶ 4).

DLC further contends that because the "current tariffs do not provide for Duquesne Light ownership and maintenance of secondary lines," the parties' Agreement amounts to an unreasonable preference. (Motion to Amend, Ex. A, Respondent's Amended Response to Complaint, ¶ 1). This argument is wholly without merit. There is no discrimination in service.

At the time the parties entered into the Agreement, the Agreement was clearly permitted pursuant to Section 9.1 of the then effective 1969 Tariff. Although the current tariff does not contain this provision, it also does not prohibit the Agreement. The Agreement is “grandfathered in” such that it is not discrimination under the Public Utility Code. *See, e.g., Crown Am. Corp. v. Pennsylvania Pub. Util. Comm’n*, 463 A.2d 1257, 1259-60 (Pa. Commw. Ct. 1983).

In the *Crown* case, Crown complained that the change of PPL’s rule to prohibit master metering unfairly disadvantaged Crown and other owners of multi-tenancy commercial buildings requiring installation of electrical service after the effective date of the rule, because multi-tenancy commercial owners who completed installation prior to the effective date of the rule were permitted to master meter. *Id.* at 1260. The Commonwealth Court affirmed the Public Utility Commission’s ruling that the new tariff was not discrimination under 66 Pa. C.S. § 1502 “or any undue disadvantage as to service.” *Id.*

Similarly here, just like master metering continued to be permitted for buildings erected prior to the effective date of the rule prohibiting master metering, it continues to be lawful (and it is in fact mandated by the parties’ contract) for DLC to own and maintain the secondary lines at the Mall. The parties’ Agreement was clearly permitted at the time it was entered into by the then-current Tariff. That the now-current Tariff does not contain a similar provision allowing DLC to own and maintain secondary electrical lines does not render the Agreement “an unreasonable preference as to service.” *Cf. id.*

In summary, the current tariff neither invalidates the parties’ Agreement, nor does it render the Agreement an “unreasonable preference.” As such, DLC’s proposed amendment is futile, and the Motion to Amend should be denied for this additional reason.

V. CONCLUSION

More than three years after this dispute arose and after litigation in both the trial and appellate courts, DLC now seeks to assert new defenses to the Complaint of PR Beaver Valley—defenses which were within the knowledge of DLC at the time of its September 26, 2007 termination letter. Put simply, DLC could have raised these defenses in support of its attempt to terminate the Agreement but failed to do so. In seeking leave to amend its Response, DLC plays “fast and loose” with the courts and this Tribunal by switching legal positions to suit its own ends in the same way that DLC seeks to cast away its obligations under the Agreement while continuing to enjoy its benefits—all of which will cause prejudice to PR Beaver Valley. For all of the reasons set forth above, this Tribunal should deny the Motion for Leave to Amend.

Dated: December 6, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing  
COMPLAINANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR  
LEAVE TO FILE AMENDED RESPONSE TO COMPLAINT upon the Respondent's counsel  
of record listed below, in accordance with the requirements of 52 Pa. Code § 1.55, by email and  
first class U.S. mail, postage prepaid:

Gary P. Hunt, Esquire  
Tucker Arensberg, P.C.  
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Dated: December 6, 2010



Stephen S. Zubrow  
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