

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA

PR BEAVER VALLEY LIMITED
PARTNERSHIP,

Plaintiff,

vs.

DUQUESNE LIGHT COMPANY,

Defendant.

CIVIL DIVISION

No. 10088-2008

**DEFENDANT DUQUESNE LIGHT
COMPANY'S BRIEF IN SUPPORT OF
PRELIMINARY OBJECTIONS TO
COMPLAINT IN CIVIL ACTION**

Filed on Behalf of the Defendant:

Duquesne Light Company

Counsel of Record for This Party:

Gary P. Hunt, Esquire
PA I.D. No. 23556

Jonathan A. Orie, Esquire
PA I.D. No. 207078

Tucker Arensberg, P.C.
1500 One PPG Place
Pittsburgh, PA 15222
(412) 566-1212

EXHIBIT 1

This doctrine serves several purposes, including: gaining the benefit derived from making use of the agency's special experience and expertise in complex areas with which judges and juries have little familiarity; upholding the statutory purpose in creating the agency by recognizing the power granted by the legislature; and promoting consistency and uniformity in certain areas under administrative policy. Elkin, 420 A.2d at 376. The doctrine of primary jurisdiction therefore allows a trial court to defer a matter to the appropriate agency where the issues involved are within the jurisdiction of that agency and require its special competence.

The PUC has long been recognized as the appropriate forum for the adjudication of issues involving the reasonableness, adequacy and sufficiency of public utility services. Elkin v. Bell Telephone Company of Pennsylvania, 420 A.2d 371, 374 (Pa. 1980). "Service" is broadly defined by the Public Utility Code as follows:

Used in its broadest and most inclusive sense, including any and all acts done, rendered, or performed, and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities, or contract carriers by motor vehicle, in the performance of their duties under this part to the patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them...

66 Pa.C.S.A. § 102 (2007).

The Public Utility Code, 66 Pa.C.S.A. § 101 et seq., places a broad range of subject matter under the control and jurisdiction of the PUC, including the authority and power to enforce, execute and carry out the provisions of the Public Utility Code, including issues within the ambit of "services". 66 Pa.C.S.A. § 501.

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. Therefore, the claims are clearly within the jurisdiction of the PUC.

The matters raised in Plaintiff Beaver Valley's Complaint are not only within the jurisdiction of the PUC, but also require the special expertise and knowledge of the PUC in

resolving this matter. The Agreement expressly incorporates the tariff filed by DLC at the time the Agreement was formed. Pennsylvania courts have held that matters relating to utility tariffs, the necessity of equipment, deposits and the use of various types of services are within the particular expertise of the PUC. Optimum Image, Inc. v. Philadelphia Electric Co., 600 A.2d 553, 557 (Pa. Super. 1991). See also County of Erie, Pennsylvania v. Verizon North, Inc., 879 A.2d 357, 364 (Pa. Cmwlth. 2005); Morrow v. Bell Telephone Company, 479 A.2d 548, 550 (Pa. Super. 1984). Published tariffs are specifically required by the Public Utility Code and govern all facets of the service provided to the utility's customers. See 66 Pa.C.S.A. § 1302. 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.

It is important to note that interpreting the Agreement requires an assessment of the adequacy and economic feasibility of continuing to own and maintain the secondary facilities under the terms of the DLC tariff. Complaint at Exhibit 1. This is again a matter requiring the special expertise of the PUC. The economic feasibility of continuing to provide services necessarily involves an assessment and examination of the sufficiency and adequacy of the rates involved in DLC providing these utility services to Plaintiff Beaver Valley. The issue of rates, and more importantly the adequacy, sufficiency, and reasonableness of these rates (as well as the services), are within the subject matter jurisdiction of the PUC. See 66 Pa.C.S.A. § 1501; see also Feingold v. Bell of Pennsylvania, 383 A.2d 791 (Pa. 1977). These matters require the special expertise of the PUC due to the issues presented by the tariff. Not only must the tariff be properly interpreted, but taken in conjunction with the tariff, the economic reasonableness and feasibility of maintaining the secondary facilities must be ascertained. A comprehensive understanding of industry custom, both present custom and those in existence

at the time the Agreement was formed, will undoubtedly facilitate the resolution of this dispute. This is without question a complex matter specifically within the expertise of the PUC.

The issues presented by Plaintiff Beaver Valley's Complaint clearly require the special competency of the PUC. As alleged by Plaintiff Beaver Valley, the Agreement was for the construction and maintenance of electrical facilities to provide electricity to the Beaver Valley Mall, which are matters properly within the jurisdiction of the PUC. Complaint at Exhibit 1. Furthermore, the Agreement incorporates the terms of a thirty nine (39) year old DLC tariff. Complaint at Exhibit 1. And finally, the issues presented by Plaintiff Beaver Valley's Complaint are not merely contract interpretation issues. Rather, the issues presented involve an examination of the tariff and the adequacy and economic feasibility of continuing to maintain the secondary facilities as set forth in that tariff. The resolution of these issues therefore requires the special expertise of the PUC.

- b. *Plaintiff Beaver Valley is seeking only equitable relief involving matters completely within the jurisdiction of the PUC.*

Plaintiff Beaver Valley is seeking a Declaratory Judgment, not monetary damages. Complaint at Counts I, II. The Pennsylvania Supreme Court has indicated that it is "eminently more appropriate" for the PUC to hear cases within its jurisdiction seeking only equitable relief rather than those for monetary damages. Elkin, 420 A.2d at 377, fn. 8. See also Behrend v. Philadelphia Electric Co., 243 A.2d 346 (Pa. 1968). The Pennsylvania Supreme Court has repeatedly declined to allow equitable relief or relief in the nature of equitable relief where the matters are within the purview of the PUC. Feingold, 383 A.2d at 796, fn. 5. See Behrend v. Philadelphia Electric Co., 243 A.2d 346 (Pa. 1968) (injunction); Chester County v. Philadelphia Electric Co., 218 A.2d 331 (Pa. 1966) (injunction); Lansdale Borough v. Philadelphia Electric Co., 170 A.2d 565 (Pa. 1961) (Declaratory Judgment); Midland Borough v. Steubenville Traction Co., 150 A. 300 (Pa. 1930) (injunction); New Brighton Borough v. New Brighton Water Co., 93 A. 327 (Pa. 1915) (Mandamus).