IN THE SUPERIOR COURT OF PENNSYLVANIA WESTERN DISTRICT

PR BEAVER VALLEY LIMITED PARTNERSHIP,	)	
	)	No. 912 WDA 2008
Appellant,	)	
v.	)	
DUQUESNE LIGHT COMPANY,	)	
Appellee.	)	

BRIEF OF APPELLANT PR BEAVER VALLEY LIMITED PARTNERSHIP

Appeal from Order of the Court of Common Pleas
Beaver County, Pennsylvania
Docketed May 2, 2008 at No. 10088 of 2008

Filed on behalf of Appellant,
PR Beaver Valley Limited
Partnership

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involve an issue within the agency's expertise. The trial court should have retained jurisdiction over this private contract dispute and should not have abdicated its responsibility to adjudicate a contract matter within its virtually unlimited original jurisdiction.

II. THE TRIAL COURT ERRED IN REFERRING THIS MATTER TO THE PUC ON THE BASIS OF AN IRRELEVANT, INADMISSIBLE PORTION OF A 1969 TARIFF

As noted above, the trial court relinquished jurisdiction on the stated basis that the dispute involves "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." Trial Court Opinion dated July 18, 2008, p. 2. In support of its argument that the matter should be transferred to the PUC, DLC only invoked the Tariff,[5] and no other PUC regulations or policies.[6] Thus, the issue is whether the Tariff is even applicable to an interpretation of the Agreement. A review of the Agreement and the portions of the Tariff which DLC contends are at issue establish that it is not.

A. The Tariff is Not Incorporated Into the Agreement Nor is it in Anyway Relevant to this Dispute

Before the trial court, DLC contended that the Tariff was incorporated into the Agreement. The trial court apparently agreed based on its decision that the dispute involved the interpretation of the Tariff and an assessment of the cost of the service relative to the rate of return. However, a review of the Agreement itself reveals otherwise.

As noted above, the Tariff is only referenced in one of the two "WHEREAS" clauses of the Agreement invoked by DLC. A "WHEREAS" clause in a contract "is but an introductory or

[5] A tariff is defined in the Code as follows: "All schedules of rates, all rules, regulations, practices, or contracts involving any rate or rates, including contracts for interchange of service, and, in the case of a common carrier, schedules showing the method of distribution of the facilities of such common carrier." 66 Pa. Cons. Stat. Ann. § 102. This case—which involves ownership and maintenance of electrical lines—does not implicate any of these defined issues, which pertain primarily to rates.

[6] Obviously, without the Tariff being at issue, DLC cannot argue the need for the PUC's special expertise.

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prefatory statement meaning 'considering that' or 'that being the case', and is not an essential part of the operating portions of the contract." Black's Law Dictionary 1101 (Abridged 6th ed. 1991). As such, the mere reference to the Tariff in a "WHEREAS" clauses does not make the Tariff or its terms part of the Agreement. *See, e.g., Neal D. Ivey Co. v. Franklin Assocs., Inc.*, 370 Pa. 225, 232, 87 A.2d 236, 239 (Pa. 1952) (noting that specific terms in the body of a contract control over recitals contained in a "WHEREAS" clause). To the contrary, the specific terms in the body of the Agreement control the issue of whether DLC may terminate the Agreement due to purportedly insufficient revenues. In section 6 of the Agreement, the provision relied upon by DLC in connection with its notice of termination of the Agreement, there is no reference at all to the Tariff, or to a right of termination due to insufficient revenues. If DLC wanted a termination right on the basis of insufficient revenues, it should have negotiated for such a clause in the Agreement. That such a clause is absent is telling.

Even if DLC were correct that the Tariff was made a part of the Agreement, the portion of the Tariff provided by DLC does not provide a right of termination. Section 9.1 of the portion of the Tariff provided by DLC states as follows:

> Where a single building will contain two or more customers who will receive service directly from the Company, the Company will furnish, install, own, operate and maintain new facilities for delivery of service to the load side of the meters supplying such customers *if* (a) in the Company's judgment the cost of so doing is justified by the revenues to be obtained, and (b) the Company is furnished easements on private property under terms satisfactory to the Company.

(Compl., Ex. 3) (emphasis added). DLC interprets the "if" contained in the above-quoted Section of the Tariff to mean "so long as". In fact, in its termination letter to PR Beaver Valley (Compl., Ex. 2), DLC misstates Section 9.1 of the Tariff and asserts that it "will own facilities up to the load side of the meter *as long as* '(a) in the Company's judgment the cost of so doing is

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justified by the revenues to be gained . . .'" (Compl., Ex. 2, p. 1) (emphasis added). Rather, the Tariff provides that it will own facilities up to the load side of the meter "*if*" in DLC's judgment the cost is justified by the revenues to be gained. (Compl., Ex. 3) (emphasis added). DLC misconstrues the meaning of "if"; it does not mean "so long as," but rather, in this context, it implies a condition precedent to DLC entering into the Agreement.[7] The conditions precedent, *i.e.*, that in DLC's judgment the cost of ownership and maintenance of the facilities be justified by the revenues to be gained, and that DLC obtain easements on the property, were satisfied in 1969. DLC determined in 1969 that the cost of ownership and maintenance of the facilities was justified by the revenues to be gained (Compl., ¶ 21), and indeed DLC has had the benefit of these revenues for the past forty (40) years. DLC may not revisit its prior judgment again now in an effort to terminate the Agreement, particularly where it did not negotiate for a termination clause providing for such a right of termination.

In addition, it was PR Beaver Valley's predecessors-in-interest which "requested" that DLC own and maintain all wiring and electrical equipment and facilities at the Mall pursuant to the then-filed Tariff. It would make no sense for this request to have been made if the Agreement could have been terminated pursuant to the Tariff the day after it was signed. If DLC's position is correct, the Agreement could have been terminated by it *anytime* based on a later determination by DLC that its revenues were insufficient. This interpretation defies logic. In sum, the portion of the Tariff provided by DLC is of no assistance to DLC—nor would it be of

[7]Tariffs are to be interpreted in accordance with their plain meaning and consistently with their language. *PPL Elec. Utils. Corp. v. Pa. Pub. Util. Comm'n*, 912 A.2d 386, 401-02 (Pa. Commw. 2006). Accordingly, Merriam-Webster's Online Dictionary defines the conjunction "if", in pertinent part, as follows: "in the event that" and "on condition that." *Merriam-Webster's Online Dictionary*, at http://www.merriam-webster.com/dictionary/if (last visited on March 23, 2009). In addition, Black's Law Dictionary defines "if" as follows: "**If.** In deeds and wills, this word, as a rule, implies a condition precedent, unless it be controlled by other words." *Black's Law Dictionary* 511 (Abridged 6th ed. 1991). The plain meaning of the word "if" as used in the Tariff is "on condition that." In other words, the Tariff sets forth conditions precedent to a utility entering into a contract such as the Agreement here, and as noted, these conditions were satisfied in 1969.

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any assistance to the PUC—in connection with whether DLC can terminate the Agreement. As such, it would be wasteful to transfer this case to the PUC for an interpretation of the Tariff.

B. It was Error for the Court to Rely on the Tariff When DLC Failed to Provide a Complete Copy of the Tariff to PR Beaver Valley

As noted above, DLC did not provide either the trial court or PR Beaver Valley with a complete copy of the Tariff. On preliminary objections challenging the jurisdiction of the trial court, it was error for the trial court to consider and to effectively admit into evidence only one page of a multi-page document, the original of which had not been provided to PR Beaver Valley.

On preliminary objections challenging a court's jurisdiction, "the moving party has the burden of *supporting* its objections to the court's jurisdiction." *Schmitt v. Seaspray-Sharkline, Inc.*, 386 Pa. Super. 528, 531, 531 A2d 801, 803 (1987) (citations omitted) (emphasis in original). Thus, as this Court noted,

> [o]nce the plaintiff has produced some evidence to support jurisdiction, the defendant must come forward with some evidence of his own to dispel or rebut the plaintiff's evidence. . . . It is only when the moving party properly raises the jurisdictional issue that the burden of proving jurisdiction is upon the party asserting it. . . . If an issue of fact is raised, the court shall take evidence by deposition or otherwise. . . . The court may not reach a determination based upon its view of the controverted facts, but must resolve the dispute by receiving evidence thereon through interrogatories, depositions, or an evidentiary hearing. . . . Where neither party presents evidence by which the court can properly resolve the issue, it is appropriate to remand with directions that an order be entered allowing the parties a reasonable period of time in which to present evidence by deposition, interrogatories or otherwise.

Id. at 531-32, 531 A.2d at 803-04 (citations omitted). Here, there was a controverted issue of fact regarding the applicability and admissibility of the Tariff. The trial court did not conduct an evidentiary hearing, or receive evidence through interrogatory answers or depositions. Rather,

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