



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

Bp8# 2165364

April 1, 2014

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**RE: Pennsylvania Public Utility Commission, Law Bureau  
Prosecutory Staff v. Duquesne Light Company;  
Docket No. M-2014-2165364**

Dear Ms. Chiavetta:

Enclosed for filing are the original and one copy of the Report of Law Bureau Prosecutory Staff's Informal Investigation of Duquesne Light Company's Real Property Acquisition And Disposition Practices in the above-captioned proceeding. As evidenced by the enclosed certificate of service, all parties have been served as indicated.

If you have any further questions regarding this matter, please contact me at 717-783-3459.

Sincerely,

Terrence J. Buda  
Assistant Counsel

Enclosures

cc: As per Certificate of Service

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**REPORT OF LAW BUREAU PROSECUTORY STAFF'S INFORMAL  
INVESTIGATION OF DUQUESNE LIGHT COMPANY'S REAL PROPERTY  
ACQUISITION AND DISPOSITION PRACTICES**

By letter dated March 19, 2010, addressed to Andrew M. Chapman, Interim President & CEO, Law Bureau Prosecutory Staff (Prosecutory Staff) opened an informal investigation of Duquesne Light Company (Duquesne or the Company) consistent with Sections 331(a) and 506 of the Public Utility Code, 66 Pa. C.S. § 331(a) and § 506; and 52 Pa. Code § 3.113. This investigation focused on Duquesne's real property acquisition and disposition practices. In addition, Prosecutory Staff specifically investigated the acquisition and disposition of the real property located at 143 Jarod Street, Moon Township, Allegheny County. For this Report, Prosecutory Staff relied on Duquesne's historical summary of actions and transactions affecting this property.

In 1914 and 1915, Duquesne Light acquired certain rights-of-way (Easement) across certain lands situated in Moon Township, Allegheny County, Pennsylvania, and installed a transmission line and transmission facilities within the Easement in the 1920s. Thereafter, a portion of that land was subdivided into developments known as the Sunnyhill Heights Plan No. 8 (recorded at Plan book Volume 164, page 53) and the Sunnyhill Heights Plan No. 8 First Addition (recorded at Plan book Volume 189, page 21). Each owner of the lots within these recorded plans took title to their respective lots subject to Duquesne's right, privilege, and authority to erect, construct, use, operate, maintain, repair, renew, remove its facilities within the Easement area, and to enter upon any other portion of the lots for access to its transmission lines and facilities. The purpose of the Easement held by Duquesne was a right-of-way for a High Tension

Power Line that crossed the property owned by George E. and Barbara L. Carpenter at 143 Jarod Drive (Block and Lot 506-P-87) (the “Carpenter Property”) along the southwest border near the Jarod Drive *cul de sac*.

As indicated, located within the Easement across the Carpenter’s property was an existing 138 kV transmission line and transmission tower. Duquesne proposed to upgrade its electric transmission lines by building a 138 kV line extension from Moon Township, across the Ohio River, and into Sewickley Borough (Sewickley Loop Project). The Sewickley Loop Project was designed to connect to the existing 138 kV transmission line at the existing tower located within Duquesne Easement on the Carpenter Property in Moon Township.

While designing the proposed line, Duquesne had numerous meetings with affected or potentially affected parties. Duquesne first met with the Sewickley Borough Manager in March 2007 to discuss preliminary substation expansion plans and the river crossing. Between 2007 and 2009, Duquesne attended approximately 12 meetings with the Sewickley Borough Manager, Zoning Officer, Solicitor, Planning Commission, Tree Commission, and the Borough Council to address issues concerning the Substation expansion, the river crossing, and right-of-way access.

In early 2008, Duquesne met with Lesley Conrey, the daughter of the Carpenters who was living at the Carpenter property at the time, to discuss the Sewickley Loop Project and the impact it would have on the Carpenter property. Duquesne sought to install two new towers within the then existing Easement across the Carpenter property and connect the existing transmission line to the new river-crossing towers. However,

the existing Easement across the Carpenter property was insufficient to properly connect the existing transmission line to the new river-crossing towers. Consequently, Duquesne approached Ms. Conrey and sought to acquire the additional right-of-way necessary for the project. According to Duquesne, the Company had no intention or desire to acquire the Carpenter property. Ms. Conrey, acting on behalf of her parents, initially was amenable to granting an expanded right-of-way across the property. In fact, Ms. Conrey agreed that Duquesne could conduct core borings on the Carpenter property for the proposed river crossing towers.

However, on October 27, 2008, Ms. Conrey notified Duquesne that she would not agree to grant Duquesne the additional right-of-way needed for the Sewickley Loop Project. Ms. Conrey instead indicated that Duquesne had to purchase the Carpenter property in its entirety. Duquesne maintains that it had no intention or desire to acquire the Carpenter property in its entirety because it only needed an expansion of the existing Easement for the Sewickley Loop Project. Since Duquesne could not condemn the needed additional right-of-way,<sup>1</sup> the Sewickley Loop Project could not be completed without the expanded right-of-way. Therefore, Duquesne submits that it had no choice but to enter into negotiations and purchase the Carpenter property. Moreover, Duquesne maintains that it had no intention or desire to keep the entire Carpenter property and, instead, always planned to sell the Carpenter property after it recorded the expanded easement necessary for the Sewickley Loop Project.

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<sup>1</sup> Given the proximity of the new 138KV line with respect to the dwelling on the Carpenter property, Duquesne was precluded from exercising the power of eminent domain to condemn the property. See 15 Pa. C.S. § 1511(b)(1)(i) (restricting public utilities' power of eminent domain for purposes of condemning a dwelling house for an aerial electric transmission line).

Consistent with this intention, on January 25, 2010, Duquesne sold the Carpenter property in an arm's length transaction by deed to Justin Schubert. In the deed to Mr. Schubert, Duquesne reserved the initial 1914/1915 Easement and an expanded easement (Second Easement) of one hundred feet in width for the Sewickley Loop Project. The Second Easement commences at the northern boundary of the Carpenter property and continues southward until it merges with the original Easement. Duquesne explained that the sole purpose of the Second Easement was to reserve a right-of-way for the new poles and new 138kV line connecting with the existing towers and lines on the Carpenter property as required for the Sewickley Loop Project.

Prosecutory Staff investigated whether this specific transaction and Duquesne's practices and procedures for acquiring and disposing of real property and obtaining all necessary regulatory approvals are in compliance with all Commission regulations and the Public Utility Code. In the letter to Mr. Chapman, Prosecutory Staff requested the following information and documents:

1. All documents including deeds and agreements of sale related to acquisition and disposition of 143 Jarod Street, Moon Township, Allegheny County.
2. All documents related to the acquisition and disposition of all real property including easements and rights-of-way within the last four years.
3. Identification of all Commission proceedings that involved Duquesne's request, including a request from an affiliated interest of the Company, for approval of any real property acquisition and disposition.

The information was provided by the Company on May 6, 2010. In particular, in response to Data Request #3, the Company acknowledged that there have been only five non-affiliated sales of property in the past four years and all have been either for less than \$50,000 or are sales of unused or unserviceable property.

With respect to the property located at 143 Jarod Drive in Moon Township, Duquesne bought the property for \$375,000 and approximately one year later sold the property for \$189,000. The Company did not seek Commission approval for the initial acquisition or the subsequent transfer of this property. An explanation of these transactions was also provided in an email from Gary A. Jack, Assistant Counsel for Duquesne, dated May 3, 2010, as follows:

Duquesne tried to buy additional right of way from the original owner, but that owner stated that they would not sell any additional right of way to Duquesne but they would sell the house and property. So we bought the property in fee. Then after the new transmission tower was installed, we did not need the house to provide service to our customers, so we put the house on the market reserving a right of way for the new tower and lines. The difference in pricing is largely attributable to, as you surmised, the additional right of way and tower installed.

Shortly thereafter on May 25, 2010, Duquesne obtained a legal opinion on a hypothetical situation from an outside law firm. The factual situation is described as follows in the legal memorandum:

An EDC holds an easement that provides it with right-of-way to operate an existing high voltage transmission line. In order to continue to improve the reliability of service and meet increased demand, the EDC proposes to reconstruct the existing line with larger facilities, which will require additional right-of-way. One property located adjacent to the existing transmission right-of-way is a non-condemnable property.<sup>1</sup> The property

was previously never used for purposes of public utility service. The EDC attempts to negotiate the additional right-of-way necessary for the project, but is unsuccessful. Thereafter, the EDC successfully negotiates for and purchases the property in fee simple. The EDC then records an additional easement giving it sufficient right-of-way necessary to construct the new transmission line. Thereafter, the EDC sells the remaining portion of the property to a new owner, subject to the properly recorded larger easement. The remaining portion of the property sold to the new owner was not used for purposes of providing public utility service while it was owned by the EDC.

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<sup>1</sup> For example, a non-condemnable property includes, among other things, a dwelling house. *See* 15 Pa.C.S. § 1511(b)(1)(i) (restricting public utilities' power of eminent domain for purposes of condemning a dwelling house for an aerial electric transmission line).

The memorandum presented the issue as whether the EDC is required to obtain a certificate of public convenience under the Public Utility Code for the purchase of property and the subsequent sale of property that remains after recording the larger easement. Under this specific situation, the law firm concluded that the EDC should not be required to obtain a certificate of public convenience for both transactions.

Prosecutory Staff disagrees, and is of the opinion that the “used or useful” standard in Section 1102(a)(3) of the Public Utility Code requires Commission approval by obtaining a separate certificate of public convenience for each transaction.

In support of its legal opinion, the law firm explained that Section 1102(a)(3) of the Public Utility Code requires that public utilities obtain a certificate of public convenience prior to transferring “the title to, or the possession or use of, any tangible or intangible property used or useful in the public service.” 66 Pa. C.S. § 1102(a)(3).

Explaining further, the law firm concluded that “property used or useful in the public

service” is property that is actually used by a public utility to provide utility service to the public. The law firm explained that the property interests at issue, when purchased from the Carpenters, were not being used to provide public utility service to or for the public. In other words, the rights acquired by the EDC at the time of purchase did not include an existing easement property right, used to provide public utility. Their analysis concluded that the relevant property interests acquired at the time of purchase were not used or useful for purposes of providing utility service to the public. Prosecutory Staff does not agree with this statement describing the transaction.

Following the same logic, the law firm also concluded that a certificate was not required when the expanded easement was deeded because, at closing for the sale of 143 Jarod Drive, the relevant property interests transferred were not “used or useful” for purposes of providing public utility service. Therefore, to clarify further, the law firm asserted that the EDC would not acquire the right to use the expanded easement to provide utility service until after it received Commission approval to construct the transmission line.

The law firm maintained that after sufficient right-of-way was deeded to the EDC, the only portion of the property that would be used to provide public service was the enhanced right-of-way. The remaining portion of the property that was resold was never used to provide utility service to the public. Therefore, the law firm’s legal opinion was that a certificate under Section 1102(a)(3) should not be required at the time of the transaction since the relevant property interests sold were not “used or useful” for purposes of providing utility service to the public. The law firm submitted that a public

utility should not be required to obtain a certificate of public convenience for the purchase or sale of real property interests that were not actually “used or useful” for providing utility service to the public. Prosecutory Staff, again, does not agree with this description of the use of the property.

After careful review of the memorandum supplied and relied upon by Duquesne, Prosecutory Staff contends that the Company’s reliance on this legal opinion is misplaced. The legal opinion was obtained after the transactions, not prior to the transactions, and after the investigation was initiated. More importantly, Prosecutory Staff questions the relevance of the legal opinion because of the belief that the facts upon which it was based are not consistent.

In order to improve the reliability of service and meet increased demand, Duquesne commenced a project to connect an existing 138 kV line into the expanded Sewickley substation with a new 138 kV line. This project required new rights-of-way in Sewickley and Moon Township. Duquesne had existing right-of-ways in both Sewickley and Moon Township but those right-of-ways were insufficient for the project.<sup>2</sup> Duquesne obtained an easement from Sewickley but was unable to obtain additional rights from the Carpenters. Duquesne thereafter bought the house and property in fee simple. Eventually, Duquesne sold the house for \$189,000, reserving a new easement for the new

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<sup>2</sup> Section 57.91 of the Commission’s regulations requires a public utility to provide a specific written notice at least fifteen days before its employees and agents are permitted to communicate in any manner with a property owner for the purpose of negotiating the acquisition of a transmission line right-of-way. Duquesne and/or its employees and agents failed to provide to the Carpenters and Borough of Sewickley the written notice required by Section 57.91. Duquesne does not contest this violation.

transmission monopoles and line. The substantial difference in price was attributed to Duquesne retaining a right-of-way for the new transmission tower and line.

The law firm supports its opinion by relying on a scenario where the subject property, 143 Jarod Street, Coraopolis, Moon Township, Allegheny County, is “adjacent” to the existing transmission right-of-way. Prosecutory Staff does not agree with this description, as the property interest is the servient estate and includes a dwelling house and encompasses the original right-of-way or dominant estate held by Duquesne. When Duquesne purchased the Carpenter’s property in fee simple, the Company was purchasing greater property rights. Duquesne acquired fee simple ownership of a property where the Company had already owned an easement or property interest.

Therefore, the titles merge and the fee simple rights wipe out the secondary right-of-way. The servient and dominant estates become united in the same owner, and the easement is extinguished by unity of title. *See Schwoyer v. Smith*, 388 Pa. 637, 641, 131 A.2d 385, 387 (1957).

Thus, no distinction should be drawn that Duquesne’s existing right-of-way on the Carpenter’s property was a property interest “adjacent” or separate from the property. If anyone else had purchased that property, they would have purchased the property subject to Duquesne’s easement. Therefore, Prosecutory Staff believes that this right-of-way property interest owned by Duquesne is not unrelated to the Carpenter’s property. Even if it were significant to recognize that the property is adjacent to Duquesne’s existing right-of-way, it is difficult to comprehend that these real estate transactions would be considered as non-utility business activity. The purchased property interests were being

used to provide public utility service to or for the public. The specific intent of the transaction was to purchase a property interest that will enable the Company to transfer to itself additional right-of-way to improve reliability and meet increased demand.

Prosecutory Staff believes that this is exactly the type of activity contemplated by the application process that requires prior Commission approval.

Accordingly, Prosecutory Staff submits that the plain language of Section 1102(a)(3) imposes the requirement of obtaining a certificate of public convenience prior to the purchase and sale of the property at issue. The possibility that a property to be purchased or sold is outside a utility's right-of-way is irrelevant to the determination of whether the property to be bought or sold is needed to provide service to its customers and therefore used for purposes of providing electric service to the public thus warranting prior Commission approval.

The threshold requirement for acts requiring a certificate of public convenience is that the property must be "used or useful" in the public service. Duquesne's position appears to be that the Commission's approval of the sale must involve property that is currently used for purposes of providing electric service to the public. The law firm's legal opinion acknowledged a failure to uncover any cases addressing the issue of when property is not used or useful in the public service. However, the law firm cited a 1985 Commission case for the precedent that the property must presently provide actual utility service to the customers, and mere planning or preparation to use real property does not meet this standard. *See Pennsylvania Public Utility Commission v. Duquesne Light Company*, Docket Nos. R-842583, *et al.*, 59 Pa. PUC 67 (Order entered January 25,

1985). Apparently, this case held that real estate held for future use is not “used and useful” property and, therefore, cannot be included in rate base.

Prosecutory Staff asserts that this case did not involve the application of Section 1102(a)(3) and the need to file an application for a certificate of public convenience. Rather, the law firm cited the “used and useful” principle of public utility law in the setting of rates for services to the public. *See also, Barasch v. Pennsylvania Public Utility Commission*, 532 A.2d 325, 516 Pa. 142, Sup. 1987, *probable jurisdiction noted* 108 S.Ct. 1105, 485 U.S. 933, 99 L.Ed.2d, *affirmed* 109 S.Ct. 609, 488 U.S. 299, 102 L.Ed.2d 646. Unlike here, where the property is encumbered by a right-of-way, used by the Company to provide public utility service, the *Barasch* decision involved vacant land that was not deemed “used and useful.” Section 1315 only applies to determine when the cost of construction or expansion of facilities may be included in rate base. *Pennsylvania Indus. Energy Coalition v. Pennsylvania Public Utility Commission*, 653 A.2d 1336 (Pa. Commw. Ct. 1995), *reargument denied, appeal granted* 665 A.2d 471, 542 Pa. 637, *affirmed* 670 A.2d 1152, 543 Pa. 307.

Prosecutory Staff concludes that under these facts, the more dispositive approach is to recognize that the words of this section of the Public Utility Code, are “clear and free from all ambiguity.” 1 Pa. C.S. § 1921(a). Clearly, when you consider the basic definitions of the words “used” or “useful,” there is a distinction that must be acknowledged. The Webster’s Ninth New Collegiate Dictionary definition of the verb “use” is “to put into action or service,” whereas the definition of “useful” is “capable of being put to use.” These words have separate and distinct meanings and the utilization of

the word “useful” imparts the clear intent that property did not have to presently provide actual utility service to customers. In addition, the use of the conjunction “or” supports the interpretation that these are alternatives and either can satisfy the standard.

Therefore, we agreed with the law firm’s citation to *Commonwealth v. Ostrosky*, 589 Pa. 437, 909 A.2d 1224, 1232 (2006) for the presumption that the legislature placed every word, sentence, and provision in the statute for some purpose.

To summarize Prosecutory Staff’s position, when Duquesne purchased the Carpenters’ property for \$375,000 without obtaining a certificate of public convenience, the Company violated Section 1102(a)(3). Duquesne purchased a property interest that would enable the Company to acquire an expanded easement to improve reliability and meet increased demand. Clearly, this property which was already subject to a Duquesne right-of-way to provide service would be useful to provide public utility service. Since this property was used to establish an expanded right-of-way for the new transmission facilities, we further find that any sale or transfer of the remaining property interest still required prior Commission approval. Therefore, Duquesne’s failure to acquire this approval amounted to another violation of Section 1102(a)(3).

Finally, Prosecutory Staff addressed Duquesne’s use of a “straw person” or “straw man” to purchase real estate, such as the purchase of the property on Chadwick Street in Sewickley. A “straw purchase” involves an individual who is not intended to have a genuine beneficial interest in a property to whom such property is nevertheless conveyed, in order to facilitate the eventual conveyance to another party. In many cases and situations, e.g., car purchase, firearms, mortgages, a straw purchase is *illegal per se*.

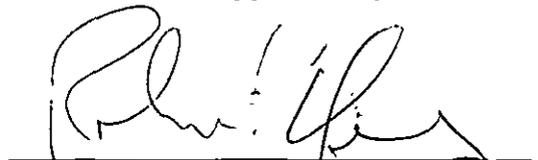
Although we do not find that Duquesne's use of a "straw man" to purchase real estate is *illegal per se*, we believe that utilities must comply with Section 1102(a) and 52 Pa. Code § 57.91 (disclosure of eminent domain power of electric utilities). We conclude that a utility's compliance with the Public Utility Code, and the various transactions that need Commission approval, requires that a transparent process should be employed by utilities. Therefore, such a policy mandates that utilities provide full disclosure in their dealings with the public.

Prepared by:



Terrence J. Buda  
Assistant Counsel

Reviewed and approved by:



Robert F. Young  
Deputy Chief Counsel

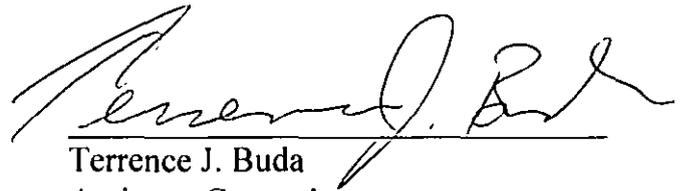
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## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing documents in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

**Notification by first class mail addressed as follows:**

Anthony D. Kanagy, Esquire  
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Dated: April 1, 2014

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