

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Broadhead Investors Group, LLC	:	
	:	
v.	:	C-2016-2570282
	:	
Duquesne Light Company	:	

**ORDER**  
**SUSTAINING IN PART AND DENYING IN PART PRELIMINARY OBJECTIONS**

On October 7, 2016, Broadhead Investors Group, LLC (Broadhead or Complainant) filed with the Pennsylvania Public Utility Commission (Commission) a formal complaint against Duquesne Light Company (Duquesne or Respondent), Docket Number C-2016-2570282. In its complaint, Broadhead alleged that Duquesne had erected and maintained a power line traversing the property which it owned at 1026 Broadhead Road in Coraopolis, Pennsylvania and that Duquesne had done so without an easement, licensing agreement or claim of right.

In addition, Broadhead alleged that after entering into an agreement of sale for this property to Continental Development, Inc. for development into a nursing and assisted living facility, this power line was impeding that sale and development and therefore constituted a continuing trespass. This trespass was further alleged to be the continuing cause of damages to Broadhead as it prevented the finalization of the agreement of sale and therefore jeopardized Broadhead's sale of the property.

Broadhead further indicated that it had filed a civil complaint against Duquesne in the Court of Common Pleas of Allegheny County charging Duquesne with trespass and requesting ejectment and injunctive relief. Since that filing, Broadhead indicated that the parties had "agreed in principal" to the relocation of the offending poles and power lines and as a result of that agreement Duquesne had merely provided a "ballpark" cost estimate for the relocation of the

poles but not an itemized breakdown of those costs. In addition, Broadhead asserted that the costs indicated for relocation actually reflected costs associated with significant upgrade and replacement to the aging poles and lines and that such costs should be borne by Duquesne and its customers. Broadhead has argued that such upgrades and replacements are capital expenditures and that Duquesne was required to pass along to customers in the form of rate increases and that Duquesne's attempt at "cost shifting" was inconsistent with the Public Utility Code.

By way of relief, Broadhead has requested three very specific remedies:

- 1) The Commission compel Duquesne to "remove the encroachment and constant trespass on the property at its sole cost and expense."
- 2) The Commission compel Duquesne to obtain the recommendations of both Broadhead and Continental as to an alternate route (of the power line) that will support future development of the land.
- 3) The Commission compel Duquesne to develop a reasonable plan of relocation of the lines giving due consideration to the recommendations of both Broadhead and Continental.

Broadhead further indicated that once these remedies are granted, it would grant an easement to Duquesne which would facilitate the relocation of the power line.

On October 17, 2016, Duquesne filed preliminary objections with attached notice to plead to Broadhead's complaint. In these preliminary objections, Duquesne sought the dismissal of the formal complaint on three grounds:

1. The Commission lacked jurisdiction to resolve the property rights dispute that formed the basis of the formal complaint.
2. Broadhead had already filed a civil suit against Duquesne in the Allegheny County Court of Common Pleas which raised the exact issues Broadhead was now raising in its formal complaint.

3. The formal complaint is legally insufficient because Duquesne's tariff expressly provides Duquesne the ability to require Broadhead to pay for the relocation of the power line in question.

Broadhead's answer to these preliminary objections was due on or before October 27, 2016. 52 Pa.Code §§ 5.101(f)(1), 1.12(a), 1.56(a)(1) and (b). Broadhead did not file answers to Duquesne's preliminary objections. Each of these objections will be addressed at length below and ruled upon.

On October 27, 2016 Duquesne filed an answer and new matter with notice to plead with the Commission. In its answer, Duquesne admitted or denied the various averments of Broadhead's complaint. In particular, Duquesne denied Broadhead's allegation that it lacked a valid right of way on the property for its power line and in support thereof included an exhibit which purported to show the granting of a right of way over the property in 1924. In its new matter, Duquesne asserted that the Commission lacked jurisdiction to render a decision in this matter and that the formal complaint was barred by the doctrine of *lis pendens*. Duquesne again asserted that the formal complaint was legally insufficient because Duquesne both held a valid easement or right of way over the property and Duquesne's tariff permitted the actions Duquesne had taken with respect to assigning the cost of relocation of the power line. Last, the new matter asserted that the formal complaint should be barred by a statute of limitations and the doctrines of consent, waiver, estoppel and/or laches. Duquesne again requested that the formal complaint be dismissed with prejudice in its entirety.

Broadhead's answer to Duquesne's new matter was due on or before October 21, 2016. 52 Pa.Code §§ 5.63(a), 1.12(a), 1.56(a)(1) and (b). Broadhead did not file an answer to Duquesne's new matter.

On December 14, 2016 a notice of hearing assigned this matter to the undersigned and scheduled it for an initial hearing on January 18, 2017. In reviewing the pleadings, it was determined that the preliminary objections which had been filed by Duquesne had not been ruled upon and that the scheduling of this matter for hearing was premature. The parties were advised

by notice of cancellation dated December 16, 2016 that the January 18, 2017 hearing had been cancelled. This matter remains assigned to the undersigned to resolve the issues which have arisen during the preliminary phase of this proceeding. Duquesne's preliminary objections are now ready for disposition. For the reasons discussed below, the objections will be sustained in part and denied in part; however Broadhead's complaint will proceed to a hearing consistent with this Order.

The Commission's Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth in 52 Pa.Code § 5.101(a) as follows:

**§ 5.101 Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in a proceeding.

Here, the Respondent's preliminary objections assert lack of Commission jurisdiction pursuant to 52 Pa.Code § 5.101(a)(1).

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). A preliminary objection asserting lack of Commission jurisdiction, pursuant to the Commission's Rules of Practice and Procedure, is therefore analogous to preliminary objections allowed by Rule 1028 of the Pennsylvania Rules of Civil Procedure.

Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources, 406 A.2d 1020 (Pa. 1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa.Super. 1991). The Commission follows this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa.Cmwlt. 1988). The Commission must view the factual assertions in the complaint in this case in the light most favorable to the Complainants and should dismiss the complaint only if it appears that the Complainants would not be entitled to relief under any circumstances as a matter of law. Equitable.

The Commission regulation at 52 Pa.Code § 5.21(a) states that a person may file a formal complaint claiming violation of a statute that the Commission has jurisdiction to administer. The regulation at 52 Pa.Code § 5.21(d) authorizes the Commission to dismiss a complaint if a hearing is not necessary and authorizes preliminary objections to be filed in response to a complaint.

The regulation at 52 Pa.Code § 5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa.Code § 5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa.C.S. § 703(a); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 557 (Pa.Cmwlth. 1989); Lehigh Valley Power Committee v. Pa. Pub. Util. Comm'n, 563 A.2d 548 (Pa.Cmwlth. 1989); S.M.E. Bessemer Cement, Inc. v. Pa. Pub. Util. Comm'n, 540 A.2d 1006 (Pa.Cmwlth. 1988); White Oak Borough Authority v. Pa. Pub. Util. Comm'n, 103 A.2d 502 (Pa. Super. 1954).

The Commission, as a creation of the General Assembly, has only the powers and authority granted to it by the General Assembly contained in the Public Utility Code. Tod and Lisa Shedlosky v. Pennsylvania Electric Co., Docket No. C-20066937 (Opinion and Order entered May 28, 2008); Feingold v. Bell Tel. Co. of Pa., 383 A.2d 791 (Pa. 1977). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa.Super. 1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 235 A.2d 602 (Pa. 1967). Subject matter jurisdiction is a prerequisite to the exercise of power to decide a controversy. Hughes v. Pennsylvania State Police, 619 A.2d 390 (Pa.Cmwlth. 1992) alloc. denied 637 A.2d 293 (Pa. 1993).

Viewing the factual assertions in the complaint in this case in the light most favorable to Broadhead for purposes of disposing of the preliminary objections, Broadhead has alleged that Duquesne erected and maintains a power line traversing the property which Broadhead owns at 1026 Broadhead Road in Coraopolis, Pennsylvania and that Duquesne had done so without an easement, licensing agreement or claim of right. In addition, Broadhead alleged that after entering into an agreement of sale for this property to Continental Development, Inc., this power line was impeding that sale and development and therefore constituted a continuing trespass. Broadhead admitted that it had filed a civil complaint against Duquesne in the Court of Common Pleas of Allegheny County charging Duquesne with trespass and requesting ejectment and injunctive relief. Duquesne has denied these allegations and argued that it maintains a valid easement and right of way over the property.

Accepting the facts alleged in the complaint as true for purposes of disposing of its preliminary objections, Duquesne alleges that the complaint raises issues that are outside the subject matter jurisdiction of the Commission. It is agreed. Both the Pennsylvania Supreme Court and the Commission have previously addressed issues relating to trespass and easements.

There is no question that the Commission lacks jurisdiction to resolve issues of trespass. The Commission has determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 9 (Opinion and Order entered July 3, 2003); Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Opinion and Order entered September 15, 1999). In Re: Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic Pennsylvania, Inc., Docket No. C-00945842 (Final Order entered October 25, 1995), the Commission stated that real property issues, such as trespass, are within the exclusive jurisdiction of the Courts of Common Pleas. Therefore, the portions Broadhead's complaint alleging issues of trespass will be dismissed due to lack of subject matter jurisdiction.

Broadhead's complaint also alleges that Duquesne has erected and maintained a power line on its property without an easement, licensing agreement or claim of right. In addition to denying this allegation, Duquesne has raised a preliminary objection relating to the Commission's jurisdiction over the scope and validity of property easements.

In Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court held that the Commission lacks jurisdiction to determine the scope and validity of an easement. The Commission has determined that it is not the proper forum for resolving property rights controversies. Rather, such controversies are a matter for a court of general jurisdiction. Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (Opinion and Order entered July 3, 2003); Fiorillo v. PECO Energy Co., Docket No. C-00971088 (Opinion and Order entered September 15, 1999).

Concerning the scope and validity of easements, the Commission has described the limits of its jurisdiction in several cases. In Boczar v. PPL Electric Utilities Corp., Docket No. C-20016332 (Opinion and Order entered February 10, 2003), the complainant alleged that the

utility was not authorized to place its poles, transformers and cable lines on his property. The Commission noted that the utility produced right of way agreements for the facilities in question. The Commission concluded that it lacked jurisdiction to determine property rights concerning these easements.

In Lou Amati/Amati Service Station v. West Penn Power Co. and Bell Atlantic Pennsylvania, Inc., Docket No. C-00945842 (Final Order entered October 25, 1995), the Commission stated that real property issues, such as trespass and whether utility facilities were located pursuant to a valid easement are within the exclusive jurisdiction of the Courts of Common Pleas.

In Messina v Bell Atlantic-Pennsylvania, Docket No. C-00968225 (Opinion and Order entered September 23, 1998), the Commission stated that it could adjudicate cases involving the existence rather than the scope and validity of an easement.

Finally, in Stavnicky v PPL Electric Utilities Corp., Docket No. C-20043368 (Final Order entered July 13, 2005) (Stavnicky), the Commission held that its subject matter jurisdiction in right of way disputes extended only to cases where there was no written documentation of an easement. If the utility produced a document purporting to show a grant of authority for an easement concerning a complainant's property, the Commission's inquiry should be at an end. The Commission determined that it lacked jurisdiction because the utility presented written documentation of its easements.

Here, Broadhead has alleged that Duquesne does not maintain an easement, licensing agreement or claim of right to the property over which this power line travels. Duquesne has argued that it maintains a valid easement over the property in question and in support of said allegation has provided a copy of a document purporting to establish that easement. The parties are clearly attempting to litigate the scope and validity of an easement. Under the authorities cited above, the Commission therefore lacks subject matter jurisdiction to adjudicate real property disputes including issues of trespass and the scope and validity of easements. The

preliminary objections relating to averments of trespass and the scope and validity of an easement are hereby sustained.

Duquesne has also raised a preliminary objection relating to the doctrine of *lis pendens*. This doctrine is recognized in 52 Pa. Code §5.101(a)(6) which permits the filing of a preliminary objection to dismiss a pleading due to the pendency of a prior proceeding. The provision at 52 Pa. Code §5.101(a)(6) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary.

The purposes of recognizing the doctrine of *lis pendens* are to prevent the respondent from having to defend several suits on the same cause of action at the same time, to prevent the squandering of scarce judicial resources on duplicative actions, to maintain an orderly legal process, and to avoid inconsistent decisions on the same causes of action. “The law is quite clear that *lis pendens* is a valid defense only when the parties, the causes of action and the relief sought are the same in both actions (citations omitted).” Procacina v. Susen, 301 Pa. Super. 392, 394, 447 A.2d 1023, 1025 (1982).

The three-pronged identity test “requires more than a mere allegation of a pending suit; it requires proof that the prior case is the same, the parties are substantially the same, and the relief requested is the same (citations omitted).” Hillgartner v. Port Authority of Allegheny Cty., 936 A.2d 131, 137 (Pa. Cmwlth. 2007). “[I]t is purely a question of law determinable from an inspection of the records in the two causes.” Hillgartner, 936 A.2d at 138 [quoting Hessenbruch v. Markle, 194 Pa. 581, 45 A. 669 (1900)].

Here, Duquesne has asserted that this doctrine should apply to Broadhead’s formal complaint given that Broadhead has admitted to filing a civil action in the Court of Common Pleas of Allegheny County. Duquesne argues that the civil action there and the formal complaint here meet the three criteria under the *lis pendens* doctrine and as such Duquesne’s preliminary objection seeks to dismiss Broadhead’s formal complaint pursuant to §§5.101(a)(6).

Duquesne's preliminary objection is somewhat contradictory. It would appear that inherent in the doctrine of *lis pendens* is an underlying premise that both forums have jurisdiction over the subject matter of the dispute. This means that in order for *lis pendens* to apply to Broadhead's civil action in the Court of Common Pleas as well as its formal complaint before the Commission, both forums must be able to entertain the subject matter involved and be in a position to grant the relief sought. Only when both forums are jurisdictionally able to do so would Duquesne be correct that it is essentially defending itself twice against the same claims in separate forums.

This preliminary objection by Duquesne is therefore contradictory. Duquesne has already argued that the Commission lacks the subject matter jurisdiction over the claims and relief sought in much of Broadhead's formal complaint. To now argue that the doctrine of *lis pendens* also applies is disingenuous. In addition, Duquesne's preliminary objection with respect to subject matter jurisdiction relating to property actions such as trespass and the scope and validity of easements has already been sustained. The portions of the formal complaint relating to those averments will be dismissed. It is therefore concluded that the doctrine of *lis pendens* does not apply when both forums do not have subject matter jurisdiction over the matters alleged. In addition even if the doctrine of *lis pendens* was found to be applicable to Broadhead's complaint, the portions of the complaint relating to trespass and the scope and validity of an easement have already been dismissed – making the question of *lis pendens* moot. As such, Duquesne's preliminary objection under 52 Pa. Code §5.101(a)(6) and the doctrine of *lis pendens* is denied.

It is noted that in the preliminary objections, as evidenced in Footnote 10, Duquesne has requested that should the Commission find that not all the elements of *lis pendens* have been met, the instant matter be stayed pending a resolution of the civil action before the Court of Common Pleas of Allegheny County. Duquesne relies on a Commission decision in AT&T Communications of Penn., LLC v. Armstrong Telephone Co., Docket No. C-2009-2098380, et al., 2009 WL 2475086 (Pa. P.U.C. July 23, 2009). Duquesne argues that the Commission made clear in this decision that "a tribunal nevertheless may stay a proceeding if the litigation of two suits would create a duplication of effort by the parties, waste judicial resources, and create a

race to judgment.” Again, given the previous discussion regarding subject matter jurisdiction and the sustaining of Duquesne’s preliminary objection relating to averments of trespass and scope and validity of easements being dismissed from the formal complaint, it is concluded that Duquesne’s request for a stay in these proceeding is also denied. There is no evidence to show that given the lack of subject matter jurisdiction by the Commission regarding these issues there will be any duplication of effort with respect to the issues remaining before the Commission.

Duquesne’s last preliminary objection relates to legal sufficiency. The preliminary objection asserts that the complaint is legally insufficient pursuant to 52 Pa. Code § 5.101(a)(4), in that the complaint fails to allege that Duquesne violated the Public Utility Code, Commission regulations or orders or its tariff provisions.

This preliminary objection is based upon the portion of Broadhead’s complaint which requests that the Commission order Duquesne to “remove the encroachment and constant trespass on the property at its sole cost and expense.” Duquesne has argued in both its answer and new matter that provisions of its tariff specifically address issues relating to the relocation of facilities as well as the assignment of the associated costs. In support of this assertion, Duquesne has cited various Commission and Commonwealth Court decisions. These decisions reinforce the position that tariff provisions which have been properly submitted to and approved by the Commission are *prima facie* reasonable and have the force of law and are therefore binding on both the utility and its customers.

As previously discussed , Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. The Commission must view the factual assertions in the complaint in this case in the light most favorable to the Complainants and should dismiss the complaint only if it appears that the Complainants would not be entitled to relief under any circumstances as a matter of law.

Viewing the complaint in a light most favorable to Broadhead as the complainant, it is noted that in addition to the requested relief of “remove the encroachment and constant trespass on the property at its sole cost and expense”, Broadhead has alleged that when provided with a cost of relocating the power line, Duquesne would only provide a “ballpark” estimate of the cost of relocation which lacked any itemization but reflected “significant upgrades and replacements”. Broadhead characterized these as capital expenditures which should be the responsibility of Duquesne alone and should be borne by Duquesne and its customers and not Broadhead. Broadhead has characterized this as “cost shifting” and asserted that it was inconsistent with the Public Utility Code.

It is therefore concluded that while Duquesne has based its preliminary objection relating to legal insufficiency on the strict language of its tariff provisions, there appears to be a question regarding the interpretation and application of that language. To wit, whether the tariff language relating to the “relocation of Company facilities” includes within its definition and interpretation costs relating to “significant upgrades and replacements” of the facilities which comprise the power line at the time it is relocated. Put simply, Duquesne has asserted that its tariff allows it to charge Broadhead for the relocation of the power line. Broadhead has argued that in addition to being charged for the relocation, it is also being charged for the “upgrade and replacement” of the power line. Preliminary objections will be granted and a complaint dismissed only where the right to relief is clearly warranted and free from doubt. This discrepancy between the parties regarding the definition and interpretation of “relocation” within the tariff language clearly leads to the conclusion that this issue and the relief requested are clear from doubt. Accordingly, Duquesne’s preliminary objection relating to legal insufficiency will be denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. That the preliminary objections filed by Duquesne Light Company at Docket Number C-2016-2570282 , relative to the real property issues raised in the complaint are sustained.

2. That the portions of the complaint relating to averments of trespass and the scope and validity of an easement are hereby dismissed.

3. That the preliminary objection filed by Duquesne Light Company at Docket Number C-2016-2570282 , relating to the doctrine of *lis pendens*, is denied.

4. That the preliminary objection filed by Duquesne Light Company at Docket Number C-2016-2570282, relating to the legal insufficiency of a pleading, is denied.

5. That the remaining issue set forth in the formal complaint filed against Duquesne Light Company by Broadhead Investors Group, LLC relating to the definition and interpretation of the tariff's relocations of facilities language will be heard in an Initial Hearing before an Administrative Law Judge.

Date: December 23, 2016

  
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Benjamin J. Myers  
Administrative Law Judge

C-2016-2570282 - BROADHEAD INVESTORS GROUP LLC V. DUQUESNE LIGHT  
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