



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

ISSUED: APRIL 5, 2001

IN REPLY PLEASE  
REFER TO OUR FILE

C-00014743

DOCUMENT  
FOLDER

TED POLAS  
1901 WATCH HILL DRIVE  
AMBRIDGE PA 15003

Ted Polas  
V.  
Duquesne Light Company

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge John H. Corbett, Jr.. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION 2<sup>ND</sup> FLOOR, KEYSTONE BUILDING, 400 NORTH STREET, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

Very truly yours,

James J. McNulty  
Secretary

Encls.  
Certified Mail  
Receipt Requested  
FG

REGINA M SESTAK ESQUIRE  
DUQUESNE LIGHT COMPANY  
CHERRINGTON CORP CTR  
MAIL DROP C4-4-3  
400 FAIRWAY DRIVE  
CORAPOLIS PA 15108

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Ted Polas

v.

Duquesne Light Company

:  
:  
:  
:  
:

Docket No. C-00014743

INITIAL DECISION

Before  
John H. Corbett, Jr.  
Administrative Law Judge

RECEIVED  
APR 06 2001

DOCUMENT  
FOLDER

History of the Proceeding

This decision dismisses a complaint, which Ted Polas ("Complainant") filed with the Pennsylvania Public Utility Commission ("Commission") on January 22, 2001. In his complaint, Mr. Polas claims Duquesne Light Company ("Respondent") violated his right to receive continuous, safe and adequate residential electric service by permitting AT&T to construct a 236 feet high cellular communications tower approximately 50 feet from a 138,000 volts Duquesne Light transmission line. Mr. Polas contends the construction of this cellular tower in such close proximity to the Respondent's transmission facilities violates certain provisions of the National Electric Code and poses a threat to the health and safety of himself and his neighbors in Economy Borough, Beaver County. For relief, he seeks an Order from this Commission to cease construction of this tower and to direct Economy Borough to immediately revoke the building permit for this project.

On February 15, 2001, Duquesne Light answered the complaint denying any responsibility for construction of the cellular tower. It avers the proposed tower will not be situated on Respondent's property or within its right-of-way. The Respondent states its facilities operate in conformity with the applicable requirements of the National Electric Safety Code ("NESC") pursuant to Commission regulations. *See*, 52 Pa. Code §57.193. Further, Duquesne Light affirms its engineering department performed a line clearance evaluation and concluded the proposed tower will meet the clearance requirements of the NESC, 1997 Edition. In new matter filed on the same date, the Respondent asserts AT&T Wireless Services, an affiliate of AT&T, is the entity constructing the proposed tower.

On the same date, Duquesne Light filed a motion to dismiss this complaint for lack of jurisdiction pursuant to Section 5.101(a)(1) of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code §5.101(a)(1). It notes that neither AT&T nor Economy Borough have been joined as parties to this action. Additionally, the Respondent argues the Commission has relinquished jurisdiction over mobile domestic cellular radio telecommunication companies by statute, 66 Pa. C.S. §102(2)(iv), and by its Order entered September 18, 1998 at *Re Omnibus Budget Reconciliation Act of 1993*, Docket Nos. L-00950104 and M-00950695. Finally, it contends the regulated status of AT&T does not confer regulated status on its wireless affiliate, AT&T Wireless Services. *See, Aronson v. Sprint Spectrum, L.P.*, 2001 WL 32927 (Pa. Superior Ct. 2001). The Complainant did not answer this motion.

A hearing in this case is scheduled for Wednesday, April 4, 2001 at 10:00 a.m. in the Pittsburgh offices of the Commission.

For the following reasons, the Respondent's motion to dismiss this complaint will be granted and the hearing will be cancelled.

## Discussion

As a creature of legislation, the Commission possesses only the authority the State Legislature has specifically granted to it in the Public Utility Code (the "Code"), 66 Pa. C.S. §§101, *et seq.* Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 477 Pa. 1, 383 A.2d 1191 (1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 427 Pa. 562, 237 A.2d 602 (1967); *Behrend v. Bell of PA*, 257 Pa. Superior Ct. 35, 390 A.2d 233 (1978); *Pa. Department of Highways v. Pa. P.U.C.*, 198 Pa. Superior Ct. 87, 182 A.2d 267 (1962); *City of Erie v. Pa. Electric Co.*, 383 A.2d 575 (Pa. Cmwlth. 1978).

Pursuant to Section 501 of the Code, 66 Pa. C.S. §501, the Commission's duty is "to enforce, execute and carry out, by its regulations, orders or otherwise" all the provisions of the Code. Section 701 of the Code, 66 Pa. C.S. §701, allows any person, having an interest in the subject matter, to file a formal complaint in writing with the Commission setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the Commission has jurisdiction to administer. *See also*, 52 Pa. Code §5.21(a).

Here, the Complainant nowhere alleges the Respondent itself committed any act to threaten the continuous provision of utility service or failed to take reasonable and adequate measures to assure continuous provision of utility service to the Complainant and his neighbors. Instead, he claims the actions of a third party, AT&T, by erecting a cellular tower in close proximity to a Duquesne Light transmission line threatens continuous provision of electric service and poses a danger to the health and safety of the general public. However, the Complainant does not join AT&T as a party to this action. Duquesne Light asserts the entity constructing the proposed tower is an

affiliate of AT&T, AT&T Wireless Services. This latter entity is an indispensable party to this case. *See*, 52 Pa. Code §5.101(a)(3).

An indispensable party is one whose interest in the subject matter of the proceeding and the relief sought is so bound up with other parties to the case that their presence as a party is so necessary that the Commission cannot proceed without them. *Kendig v. Dean*, 97 U.S. 423, 24 L.Ed. 1061 (1878). Stated differently, a party is indispensable, when his/her rights are so connected with the claim of the litigants that no decree can be entered without impairing those rights. *Tigue v. Basalyga*, 451 Pa. 436, 304 A.2d 119 (1973). Obviously, any decision the Commission may reach on the merits of the present complaint may impair the rights of AT&T Wireless Services relating to its proposed cellular tower. The question then becomes whether the Commission has jurisdiction over AT&T Wireless Services so it can join, *sua sponte*, that entity as an indispensable party to this action.

The Public Utility Code provides that every public utility subject to the jurisdiction of the Commission must furnish and maintain adequate, efficient, safe, and reasonable service and facilities as shall be necessary or proper for the accommodation, convenience and safety of its patrons, employees and the public. 66 Pa. C.S. §1501. Section 102 of the Code, 66 Pa. C.S. §102, in relevant part defines "service" broadly so as to include "any and all acts done, rendered, or performed, and any and all things furnished or supplied by public utilities . . . in the performance of their duties under [the Code]." Section 102 defines "facilities" so as to include all of the plant and equipment of a public utility.

Section 102(1)(vi) of the Code defines "public utility" in relevant part as any person or corporation owning or operating in the Commonwealth equipment or facilities for:

Conveying or transmitting messages or communications, except as set forth in paragraph (2)(iv), by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation. (Emphasis added).

However, an exception excludes from the definition of "public utility" "any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service." 66 Pa. C.S. §102(2)(iv) (emphasis added). Stated differently, unless a provider of cellular service is "otherwise a public utility," it does not become a regulated public utility under this Commission's jurisdiction merely because it provides cellular service to the public for compensation.

In *Bell Atlantic Mobile Systems, Inc. vs. Zoning Hearing Board*, 676 A.2d 1255 (Pa. Cmwlth. 1996), the Commonwealth Court held that Bell Atlantic Mobile Systems, Inc., which provides cellular telephone service, is not a "public utility." Instead, the Commonwealth Court concluded Bell Atlantic Mobile Systems, Inc. is a non-regulated private business entity that is not subject to filing rates and tariffs with the Commission. *Id.* at 1260. The Supreme Court of Pennsylvania affirmed the Commonwealth Court's decision in *Crown Communications vs. Zoning Hearing Board of Glenfield*, 550 Pa. 266, 705 A.2d 427 (1997).

Moreover, a wireless telephone service provider does not become a regulated public utility simply because the Commission regulates a related entity. In *Crown Communications*, Bell Atlantic Mobile Systems, Inc., like AT&T Wireless Services in this case, is related to a regulated public utility under the jurisdiction of this Commission, *i.e.*, Bell Atlantic-Pennsylvania, Inc. in *Crown Communications*, and AT&T in the present case, respectively. *Id.* at 430, n.1. Nevertheless, the Supreme Court ruled in *Crown Communications*, that Bell Atlantic-Pennsylvania, Inc.'s regulated status did not confer regulated status on its affiliate, Bell Atlantic Mobile Systems, Inc. As a

result, while the Commission regulates the former, it does not regulate the latter entity. In a similar fashion, the regulated status of Sprint Communications Company, L.P. does not confer regulated status on its affiliate, Sprint Spectrum, L.P., which is another wireless telecommunications provider. *Aronson, et al. v. Sprint, et al.*, 2001 Pa. Superior Ct. 15, 2001 Pa. Superior Ct. LEXIS 15 (2001). Thus, the law is well settled that the Commission has no jurisdiction over a wireless telecommunications provider, such as AT&T Wireless Services.

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary motions. 52 Pa. Code §§5.101-103. Section 5.101(a)(3) of the Commission's Rules, 52 Pa. Code §5.101(a)(3), provides that a party may move "to dismiss a pleading that is insufficient as to substance" or "that fails to join an indispensable party." The present preliminary motion to dismiss this complaint is analogous to preliminary objections authorized by Rule 1028 of the Pennsylvania Rules of Civil Procedure. With respect to a preliminary objection seeking dismissal of a pleading, the Supreme Court of Pennsylvania has held that such a motion will be granted only where relief is clearly warranted and free from doubt. *Interstate Travelers Services, Inc. v. Pa. Dept. of Environmental Resources*, 486 Pa. 536, 406 A.2d 1020 (1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 407 Pa. Superior Ct. 157, 595 A.2d 172 (1991). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, Docket No. C-850323 (Order entered November 11, 1985). Therefore, a preliminary motion seeking dismissal of a complaint will be granted only in unusual circumstances, where the right to this remedy is clear and no doubt exists as to its appropriateness.

In the case *sub judice*, the Complainant fails to allege any act or omission of the Respondent that threatens the continuous provision of electric service or poses a danger to the health and safety of the general public. Further, the Commission has no jurisdiction over an indispensable party, AT&T Wireless Services, without whom it

cannot render a meaningful decision. Likewise, Economy Borough, which also appears to be an indispensable party to this proceeding, is obviously not a public utility. For the reasons discussed above, the Commission has no jurisdiction over Economy Borough. *See*, 66 Pa. C.S. §701. Therefore, this complaint must be dismissed.

### Conclusions of Law

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding to the limited extent explained in the foregoing discussion. 66 Pa. C.S. §701.

2. The Commission has no jurisdiction over AT&T Wireless Services, which furnishes mobile domestic cellular radio telecommunications service. 66 Pa. C.S. §102(2)(iv).

3. AT&T Wireless Services is an indispensable party to this case. 52 Pa. Code §5.101(a)(3).

4. The Commission has no jurisdiction over Economy Borough under the circumstances of this case. 66 Pa. C.S. §701.

5. Economy Borough is an indispensable party to this case. 52 Pa. Code §5.101(a)(3).

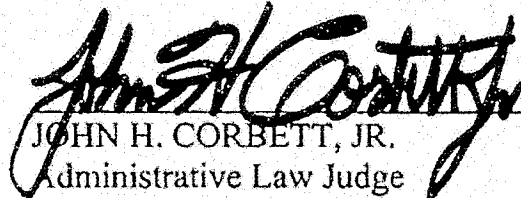
6. The Complainant fails to allege any act or omission of the Respondent that threatens the continuous provision of electric service or poses a danger to the health and safety of the general public. 66 Pa. C.S. §1501.

ORDER

THEREFORE,  
IT IS ORDERED:

1. That the complaint of *Ted Polas v. Duquesne Light Company*, which is docketed with the Pennsylvania Public Utility Commission at Docket No. C-00014743, is hereby dismissed.
2. That the hearing in this case now scheduled for Wednesday, April 4, 2001 at 10:00 a.m. is hereby cancelled.

Dated: March 16, 2001

  
\_\_\_\_\_  
JOHN H. CORBETT, JR.  
Administrative Law Judge

Act 294

Case Identification:

C-00014743; Ted Polas v.  
Duquesne Light Company

Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

April 18, 2001

This decision has not been reviewed by OSA.

RECEIVED

APR 18 2001

01846

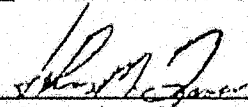
\* \* \* \* \*

OFFICE OF SPECIAL ASSISTANTS

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

I do not want full Commission review of this decision.

  
\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date  
4-19-01

RECEIVED  
SECRETARY BUREAU  
01 APR 19 AM 10:30

BTI

**DOCKETED**  
APR 19 2001

DOCUMENT  
FOLDER

Act 294

Case Identification:

C-00014743; Ted Polas v.  
Duquesne Light Company

Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

April 18, 2001

This decision has not been reviewed by OSA.

RECEIVED

APR 5 2001

OFFICE OF SPECIAL  
ASSISTANTS

\* \* \* \* \*

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

Robert K. Blomgren  
Commissioner

4/5/01  
Date

Act 294

Case Identification: C-00014743; Ted Polas v.  
Duquesne Light Company

Initial Decision By: ALJ John H. Corbett, Jr.

Deadline for Return to OSA: April 18, 2001

This decision has not been reviewed by OSA.

RECEIVED

APR 17 2001

\* \* \* \* \*

OFFICE OF SPECIAL ASSISTANTS

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

*Nora Mead Brownell*  
\_\_\_\_\_  
Commissioner

*4-10-01*  
\_\_\_\_\_  
Date

Act 294

Case Identification: C-00014743; Ted Polas v. Duquesne Light Company

Initial Decision By: ALJ John H. Corbett, Jr.

Deadline for Return to OSA: April 18, 2001

This decision has not been reviewed by OSA.

RECEIVED

APR 18 2001

\* \* \* \* \*

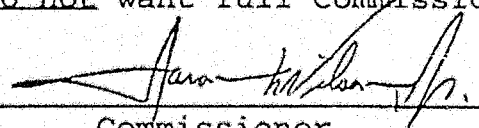
OFFICE OF SPECIAL ASSISTANTS

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

  
\_\_\_\_\_  
Commissioner

4/18/01  
\_\_\_\_\_  
Date

Act 294

Case Identification:

C-00014743; Ted Polas v.  
Duquesne Light Company

Initial Decision By:

ALJ John H. Corbett, Jr.

Deadline for Return to OSA:

April 18, 2001

This decision has not been reviewed by OSA.

RECEIVED

APR 18 2001

\* \* \* \* \*

OFFICE OF SPECIAL ASSISTANTS

I want full Commission review of this decision.

\_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

I do not want full Commission review of this decision.

*Terrance J. Fitzgerald*  
\_\_\_\_\_  
Commissioner

*4-17-01*  
\_\_\_\_\_  
Date

DATE: May 10, 2001

SUBJECT: C-00014743

TO: Office of Administrative Law Judge  
Beth Plantz

FROM: James J. McNulty  
Secretary

DOCKETED  
MAY 10 2001

DOCUMENT  
FOLDER

Ted Polas  
VS  
Duquesne Light Company

Copies of the Initial Decision have been served upon all parties.

Neither exceptions nor requests for review from the Commissioners have been received by the Commission. This matter is referred to your office for whatever action you deem necessary.

cc: Office of Special Assistants

BTJ

P.S. Please note that exceptions or reply exceptions may come in timely with certificate of mailings. A second memo will not be released for these exceptions.