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File #: 166395

March 15, 2017

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Application of PPL Electric Utilities Corporation Under 15 Pa.C.S. § 1511(c) For A Finding And Determination That The Service To Be Furnished By The Applicant Through Its Proposed Exercise Of The Power Of Eminent Domain To Acquire Right-of-Way And Easement Over A Certain Portion Of The Lands Of Dalton Equity, Inc., In West Abington, Lackawanna County, Pennsylvania Is Necessary Or Proper For The Service Accommodation, Convenience, Or Safety Of The Public - Docket No. A-2016-2571918

Dear Secretary Chiavetta:

Enclosed for filing is the Joint Motion to Strike and Motion in Limine of PPL Electric Utilities Corporation, in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Lindsay A. Berkstresser

LAB/jl
Enclosure

cc: Certificate of Service
Honorable Elizabeth Barnes

CERTIFICATE OF SERVICE

(Docket No. A-2016-2571918)

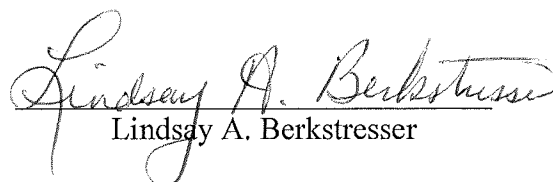
(Docket No. A-2016-2571923)

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL & FIRST CLASS MAIL

Michael R. Mey, Esquire
Mey & Sulla, LLP
1144 East Drinker Street
Dunmore, PA 18512
*Counsel for Dalton Equity, Inc.
& Heirs of Davis Dean*

Date: March 15, 2017


Lindsay A. Berkstresser

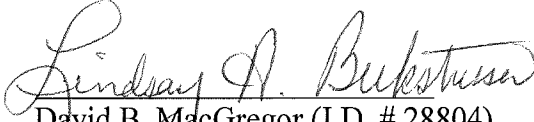
**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application Of PPL Electric Utilities :
Corporation Under 15 Pa.C.S. § 1511(c) For A :
Finding And Determination That The Service :
To Be Furnished By The Applicant Through : Docket No. A-2016-2571918
Its Proposed Exercise Of The Power Of :
Eminent Domain To Acquire Right-of-Way :
And Easement Over A Certain Portion Of The :
Lands Of **Dalton Equity, Inc.**, In West :
Abington, Lackawanna County, Pennsylvania :
is Necessary or Proper for the Service, :
Accommodation, Convenience, or Safety of :
the Public :

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.103(c), YOU MAY FILE A REPLY TO THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOUR REPLY SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY OF YOUR REPLY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.

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Of Counsel:
Post & Schell, P.C.

Dated: March 15, 2017

Attorneys for PPL Electric Utilities Corporation

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application Of PPL Electric Utilities :
Corporation Under 15 Pa.C.S. § 1511(c) For A :
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Lands Of **Dalton Equity, Inc.**, In West :
Abington, Lackawanna County, Pennsylvania :
is Necessary or Proper for the Service, :
Accommodation, Convenience, or Safety of :
the Public :

**JOINT MOTION TO STRIKE AND
MOTION IN LIMINE OF
PPL ELECTRIC UTILITIES CORPORATION**

TO ADMINISTRATIVE LAW JUDGE ELIZABETH H. BARNES:

PPL Electric Utilities Corporation (“PPL Electric”), by and through its attorneys, hereby files this Joint Motion to Strike and Motion in Limine, pursuant to 52 Pa. Code §§ 5.103 and 5.412, and requests: (1) pages one through seven of Dalton Equity, Inc.’s (“Dalton Equity”) “Direct Evidence” be stricken and the relief requested therein denied, and (2) Dalton Equity be precluded from presenting any additional evidence that was not included in its “Direct Evidence” and that should have been presented in its direct case. In support thereof, PPL Electric states as follows:

MOTION TO STRIKE

1. On December 14, 2016, Administrative Law Judge Elizabeth H. Barnes’s (the “ALJ”) issued a Procedural Order establishing a Procedural Schedule in this proceeding.

Pursuant to the Procedural Schedule, the deadline for Dalton Equity to submit Direct Testimony was February 28, 2017.

2. Dalton Equity submitted a document labeled “Direct Evidence” on February 28, 2017.

3. Dalton Equity’s “Direct Evidence” is a seven-page document that appears to be a statement from Dalton Equity’s counsel and Exhibits one through five.¹ The statement from Dalton Equity’s counsel presented in Dalton Equity’s “Direct Evidence” is attached hereto as Exhibit A.

4. The statement from Dalton Equity’s counsel should be stricken in its entirety because it is not proper testimonial evidence and does not comply with the ALJ’s December 14, 2016 Procedural Order directing that the parties’ testimony must comply with the requirements of 52 Pa. Code § 5.412. (Procedural Order ¶ 11.)

5. The Commission’s regulations at 52 Pa. Code § 5.412 set forth the requirements for written testimony.

Written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner.

* * *

Written testimony must normally be prepared in question and answer form, include a statement of the qualifications of the witness and be accompanied by exhibits to which it relates. A party offering prepared written testimony shall insert line numbers in the left-hand margin on each page. A party should also use a logical and sequential numbering system to identify the written testimony of individual witnesses.

¹ PPL Electric has no opposition to the admissibility of the exhibits attached to Dalton Equity’s “Direct Evidence,” which were produced by PPL Electric in discovery. PPL Electric has previously agreed with counsel for Dalton Equity that for purposes of the evidentiary hearing, PPL Electric will timely provide verifications and/or affidavits for any PPL Electric discovery responses that are attached to and submitted with Dalton Equity’s written testimony.

§ 5.412(c), (e) (emphasis added). Dalton Equity's "Direct Evidence" completely fails to comply with any of the requirements of 52 Pa. Code § 5.412.

6. Moreover, Dalton Equity's "Direct Evidence" is not sponsored by a witness, or even testimony for that matter. Rather, the "Direct Evidence" is framed as a statement, legal argument, and request for relief by Dalton Equity's counsel. Dalton Equity's "Direct Evidence" is improper and should be stricken because it is not factual or expert testimony.

7. Because Dalton Equity's Direct Evidence is not testimonial evidence properly sponsored by a witness, PPL Electric is unable to cross examine the statements contained therein, as required by 52 Pa. Code § 5.243(a). Procedural due process standards are applicable to Commission proceedings. *Smith v. Pa. PUC*, 162 A.2d 80, 83 (Pa. Super. Ct. 1969). "A party has a right to cross-examine witnesses who have testified for the adverse party, and the right is absolute, and not a mere privilege; so after a witness has been examined in chief, he must be turned over to the opposing party for cross-examination." *Pa. PUC, et al. v. Lemont Water Co.*, 1993 Pa. PUC LEXIS, Docket No. R-932673, (Recommended Decision November 29, 1993), 1994 Pa. PUC LEXIS, Docket No. R-932673, (Order entered February 3, 1994) ("litigants in Commission proceedings should be afforded the guarantees of procedural due process.") "In hearings before the commission all parties must be apprised of the evidence submitted, and must be given opportunity to cross-examine witnesses. . . ." *In Re Shenandoah Suburban Bus Lines*, 46 A. 2d 26, 29 (Pa. Super Ct. 1946), *aff'd* 50 A.2d 301 (Pa. 1947). Accordingly, the statements by legal counsel on pages one through seven of Dalton Equity's "Direct Evidence" should be stricken because they are not sponsored by a witness of any kind and, therefore, PPL Electric would not have an opportunity to cross examine any witness on the statements contained therein.

8. Dalton's Equity's "Direct Evidence" is simply a restatement of its legal position by Dalton Equity's counsel. The statement from Dalton Equity's counsel consists of legal interpretations, arguments, and conclusions. Dalton Equity's "Direct Evidence" sets forth the following legal arguments and conclusions: (1) PPL Electric's proposed exercise of its eminent domain power is not proper for the service, accommodation, convenience, or safety of the public (Dalton Equity "Direct Evidence" ¶ 6, 16); (2) Commission jurisdiction is improper since the proposed transmission line would serve a single private party (Dalton Equity "Direct Evidence" ¶ 6); (3) PPL Electric's proposal is for a non-public purpose (Dalton Equity "Direct Evidence" ¶ 8 and 9); and (4) PPL Electric has failed to carry its burden of proof (Dalton Equity "Direct Evidence" ¶ 15).

9. Legal arguments and conclusions are not admissible as witness testimony. *Pa. PUC v. North Penn Gas Company*, Docket No. R-80111375, 1981 Pa. PUC LEXIS 10, 18-19 (December 4, 1981) (opinion evidence concerning an ultimate legal conclusion is inadmissible as ultimate legal conclusions are to be decided by the Commission). Rather, the proper form for parties to present legal arguments is in their briefs. *Id.* ("Argument as to the ultimate legal conclusion should properly be presented in briefs, not in the form of expert opinion testimony.") *See also Pa. PUC v. Pennsylvania Gas and Water Company- Water Division*, Docket No. R-850178, 1986 Pa. PUC LEXIS 146 (February 4, 1986) (upholding ALJ's ruling striking the testimony of attorney witness who testified that utility's normalization treatment of assets would violate the Internal Revenue Code because such testimony presented a legal interpretation and legal conclusion and directing the parties to address the issue at the briefing stage).

10. The legal interpretations, arguments, and conclusions presented by Dalton Equity's counsel as pages one through seven of Dalton Equity's "Direct Evidence" are improper

testimony and should be stricken. Dalton Equity will have an opportunity to present its legal arguments when it submits briefs pursuant to the Procedural Schedule established in this proceeding.

11. Dalton Equity's "Direct Evidence" also contains a request for relief. Specifically, Dalton Equity requests that the Commission "deny and dismiss PPL's Application." (Dalton Equity "Direct Evidence," p. 7.) Dalton Equity's request for relief is improper at this juncture.

12. The purpose of direct testimony is for the parties to present their factual and expert testimonial evidence in support of their case-in-chief. Direct testimony is not a dispositive motion as suggested by the relief requested in Dalton Equity's "Direct Evidence."

13. Further, the Commission cannot rule on PPL Electric's Application until a complete evidentiary record has been developed. It is well established that any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence of record. *Met-Ed Indus. Users Grp. v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). Before the Commission may consider information, it must first be offered and admitted to the record. *Helsel v. Commonwealth, DOT*, 605 A.2d 454, 455 (Pa. Cmwlth. 1992). Indeed, for an agency to rely on facts withheld from the record is a denial of due process. *See Kyu Son Yi v. State Bd. of Veterinary Med.*, 960 A.2d 864, 873 (Pa. Cmwlth. 2008) (holding that information that has not been offered into the record cannot be used to sustain an adjudication). At this point in the proceeding, no evidence has been offered or admitted into the record. Indeed, this will not occur until the evidentiary hearing scheduled for April 12, 2017. The disposition of PPL Electric's Application cannot and will not occur until after the record has closed and the matter has been fully briefed pursuant to the Procedural Schedule established in this proceeding.

14. For the reasons stated above, pages one through seven of Dalton Equity’s “Direct Evidence,” which contains a statement from Dalton Equity’s counsel, should be stricken in its entirety and not considered as evidence in this proceeding.

MOTION IN LIMINE

1. PPL Electric hereby incorporates by reference paragraphs one through fourteen as set forth above.

2. In the ALJ’s December 14, 2016 Procedural Order, the ALJ directed the parties to comply with the provisions of Section 5.243(e) of the Commission’s regulations. (Procedural Order ¶ 12.) Section 5.243(e) of the Commission’s regulations expressly prohibits a party from “introduce[ing] evidence during a rebuttal phase which . . . should have been included in the party’s case-in-chief.” 52 Pa. Code § 5.243(e)(2).

3. As explained above, Dalton Equity has failed to present direct testimony pursuant to the Procedural Schedule established in this proceeding. Pursuant to Section 5.243(e) of the Commission’s regulations, Dalton Equity should be prohibited from presenting any evidence that should have been included in Dalton Equity’s direct case at a later stage of the proceeding.

4. Allowing Dalton Equity to present evidence that should have been included in its direct case at a later stage of the proceeding would violate PPL Electric’s due process rights. Due process requires that a party be afforded a fair opportunity to respond to adverse claims. *In re Shenandoah Suburban Bus Lines, Inc.*, 46 A.2d 26, 29 (Pa. Super. Ct. 1946) (“In hearings before the commission all parties must be apprised of the evidence submitted, and must be given opportunity to cross-examine witnesses; to inspect documents and to offer evidence in explanation or rebuttal.”) “The allowance of new claims late in a case raises significant due

process concerns. Such concerns arise from the lack of adequate time to . . . respond adequately to adverse positions.” *Pa. PUC, et al. v. UGI Utilities*, Docket No. R-00932862, 1994 Pa. PUC LEXIS 138, *82-83 (May 23, 1994) (rejecting a claim that was introduced for the first time by a party in the rebuttal phase of the proceeding, rather than in the party's direct case); *see also Pa. PUC v. Duquesne Light Co.*, 59 Pa. PUC 67 (January 25, 1985) (disallowing the untimely introduction of exhibits); *Pa. PUC v. Pennsylvania-American Water Company*, 1989 Pa. PUC LEXIS 170, *167-169, 71 Pa. PUC 210 (October 27, 1989) (“late filed updates deny opposing parties an opportunity . . . to respond with countering evidence or testimony”).

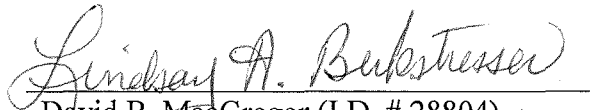
5. Even if Dalton Equity’s “Direct Evidence” is not stricken for the reasons stated above, Dalton Equity should not be permitted to submit additional evidence, in the form of rebuttal testimony or otherwise, at a later stage of this proceeding that should have been presented in its direct case. Presentation of such evidence in the rebuttal stage would violate 52 Pa. Code § 5.243(e)(2), the ALJ’s December 14, 2016 Procedural Order, and established Commission precedent.

6. Accordingly, PPL Electric respectfully requests that the scope of any additional evidence presented by Dalton Equity should be limited to exclude all evidence that should have been presented in Dalton Equity’s direct case.

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that
Administrative Law Judge Elizabeth H. Barnes:

- (1) Strike pages one through seven of Dalton Equity's "Direct Evidence";
- (2) Deny the relief requested in Dalton Equity's "Direct Evidence"; and
- (3) Limit the scope of any additional evidence presented by Dalton Equity to exclude evidence that should have been presented in its direct case.

Respectfully submitted,



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Of Counsel:

Post & Schell, P.C.

Dated: March 15, 2017

Attorneys for PPL Electric Utilities Corporation

Exhibit A

Michael R. Mey, Esq.
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ID #41441
1144 East Drinker Street
Dunmore, PA 18512
(570) 961-1929

Application Of PPL Electric Utilities :
Corporation Under 15 Pa.C.S. §1511© :
For A Finding and Determination That :
The Service To Be Furnished By The :
Applicant Through Its Proposed : Docket No.: A-2016-2571923
Exercise Of The Power Of Eminent : Consolidated with
Domain To Acquire Right-of-Way : Docket No.: A-2016-2571918
And Easement Over A Certain :
Portion Of The Lands of **Dalton Equity,** :
Inc., In West Abington, Lackawanna :
County, Pennsylvania is Necessary or :
Proper for the Service, Accommodation, :
Convenience, or Safety of the Public :

**DIRECT EVIDENCE
OF
DALTON EQUITY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

NOW COMES Dalton Equity, Inc., by and through its counsel, Mey & Sulla, LLP, and by these presents does hereby submit the following Direct Evidence in Opposition to the above Application filed by PPL :

I. INTRODUCTION

1. Dalton Equity, Inc. is the fee simple owner of a property located

in Lackawanna County who, by Order of this Court, and consent of PPL, was granted the right to intervene in this matter December 13, 2016.

2. Dalton Equity has a direct, immediate and substantial interest in the subject matter of the Petitions filed by PPL since its property would be directly affected by PPL's Application.

3. Dalton Equity does not want a power line installed on its property.

4. Dalton Equity's property is currently undeveloped, however, since soon after its purchase Dalton's intention was always to develop the property for residential use and has performed extensive survey and land planning in pursuit of its plan.

5. PPL has alleged that the sole user for this more than four mile long, hundred foot wide proposed right-of-way is William's Partners, the operator of a number of natural gas pipelines and is, upon information and belief a publicly traded for profit business entity.

6. PPL's proposal to take Dalton's land cannot, therefore, be proper for the service, accommodation, convenience, or safety of the public. Specifically, PPL's invocation of the jurisdiction of the Pennsylvania Public Utility Commission is improper since its proposed power line would service only a single private party.

II. PPL HAS FAILED TO DEMONSTRATE NEED FOR THE PROJECT

7. PPL has filed an application with the PUC for a finding and determination that it can use its powers of eminent domain to acquire a right-of-way and easement over the private property of Dalton equity to construct a 69 kV transmission line more than 4 miles long to provide electric power to a single new customer, Williams:

PPL Electric Utilities Corporation ("PPL Electric") herein files this Application, pursuant to 15 Pa.C.S. § 1511(c), for a finding and determination that the service to be furnished through its proposed exercise of the power of eminent domain, to acquire right-of-way and easement over a certain portion of the lands of Dalton Equity, Inc. ("Dalton"), in West Abington, Lackawanna County. As explained below, the proposed use of eminent domain power to acquire the right-ofway across the Dalton property is necessary for the construction of a new 69 kV transmission line needed to supply electric power to a new customer located in Clinton Township, Wyoming County (hereinafter, the "Project").

Ex. "1" [PPL Application page -1-]

8. Dalton equity opposes PPL's request for the PUC's approval of PPL's use of eminent domain to take private property for a non-public purpose.

9. PPL's application, and the direct testimony attached thereto, provides no evidence that public need, service, accommodation, convenience or safety would be served by supplying 69 kV service to Williams proposed compressor station.

10. PPL's application demonstrates that the proposed 69 kV line would be for a single customer, Williams, and provides no taps for any other customers.

11. Records produced by PPL in discovery list twenty-seven (27) property owners along the proposed 4.3 mile right-of-way all of whom have entered into contractual right-of-way agreements with PPL and none of which have requested or made part of their contractual agreements for the right or ability to tap the proposed 69 kV line. **Ex. "2"**

12. PPL and Williams have entered into a contractual agreement by which Williams will be 100% responsible for the projected \$12 million costs associated with the proposed 69 kV the line including, but not limited to, siting, construction, right-of-way acquisition and engineering. **Ex. "3" [PPL Electric Utilities Corporation Response to Interrogatories of Dalton Equity, Inc. Set I Dated January 3, 2017]**

13. The agreement between PPL and Williams further provides for a "trueing up" accounting for the actual costs incurred by PPL requiring Williams to pay any costs in excess of \$12 million or being refunded any balance

should the costs not exceed \$12 million. . **Ex. "3" at page 3 ¶ 6.**

14. Documents produced by PPL in response to Dalton's discovery requests contain an acknowledgment by PPL in an email from a PPL project manager to Williams on August 4, 2016 that its proposed use of eminent domain power is but for a single customer:

"I apologize for the delay, yes I did get to speak with OGC regarding starting construction while filing for the Declaration of Taking. Starting construction while filing for the Declaration of Taking still poses a risk to the project. **In the past, PPL has not condemned for a customer,** and even with a PUC approval there is a chance that PPL may get challenged during the Declaration of Taking process and not win that challenge. Worse case, if that were to happen and construction has started on the other parcels, that work may go to waste if a re-route of line is needed to avoid the parcel that PPL tried to condemn but was lost by the legal challenge." **Ex. "4"**

15. In support of its application PPL has attached a resolution by its Board of Directors purporting to show "*public need*" and, therefore, the proper use of eminent domain power to take the property of Dalton equity. **See, PPL Electric Exhibit No. CK-5.**

16. A plain reading of the resolution on its face fails to establish that public need, service, accommodation, convenience or safety would be served

by supplying 69 KV service to Williams proposed compressor station; it identifies no benefit to the public:

I, ELIZABETH STEVENS DUANE, the duly elected and acting Secretary of PPL Electric Utilities Corporation (the "Company"), do hereby CERTIFY that the following is a true and correct copy of certain resolutions duly adopted by the Board of Directors of the Company at a meeting held on October 5, 2016, and that said resolutions *have not been altered, amended or repealed* and are in full force and effect:

WHEREAS, Dalton Equity, Inc. is the owner of certain property in West Abington, Lackawanna County, Pennsylvania, as more particularly described in Exhibit B (the "Dalton Land"); and

WHEREAS, the construction by the Company of a new 4.3- mile 69 kV transmission line on, over, across, or under the Dalton Land is necessary for the supply of light, heat and power to the public;

RESOLVED, That the proper officers of the Company are hereby authorized and directed to execute such bonds and/or other paper, to take such action and to bring such proceedings on behalf of the Company as may be necessary or advisable in the exercise of the power of eminent domain to condemn and appropriate such rights-of-way and easements or fee simple title and to enter upon, use and occupy any of the Dalton Land for the purposes described in the above resolutions.

15. As the applicant, PPL has the burden of demonstrating each element required to support its application for the use of eminent domain power¹; here, the resolution of PPL's Board of Directors barely mouths the words, and not all of them, and clearly and convincingly fails to carry its

¹ Section 332(a) of the Public Utility Code provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. 66 Pa.C.S. § 332(a).

burden of proof by allegation , purported testimony or documentary evidence.

WHEREFORE, the Intervener, Dalton Equity, Inc., respectfully requests this Honorable Court to deny and dismiss PPL's Application.

RESPECTFULLY SUBMITTED:

MEY & SULLA, LLP

A handwritten signature in cursive script, appearing to read "Michael R. Mey".

MICHAEL R. MEY, ESQ.