

May 11, 2017

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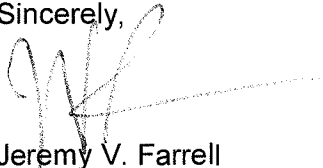
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Thomas Beatty v. Duquesne Light Company
Docket No. C-2017-2588733

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Preliminary Objections to Complainant's Amended Formal Complaint. A copy of this document has been served upon Complainant's counsel in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Enclosure

cc: Michael Witherel, Esq. (with enclosure) (via email and regular U.S. mail)
Administrative Law Judge Mark Hoyer (with enclosure) (via facsimile)

LIT:623198-1 014657-158498

II. THE COMPLAINT'S ALLEGATIONS

3. Duquesne Light operates a transmission circuit that runs through Complainant's property. Amended Formal Complaint, ¶ 3.

4. Complainant acknowledges that Duquesne Light relies upon a right of way agreement that permits it to "trim or remove any trees, shrubbery, or obstruction which at any time may interfere or threaten to interfere with" the operation of the transmission circuit. Amended Formal Complaint, ¶ 5.

5. Duquesne Light has proposed to remove 39 trees from Complainant's property, which Complainant contends is "inconsistent with the interpretation of the vaguely worded easement." Amended Formal Complaint, ¶ 8. Along similar lines, Complainant alleges that some of the trees in question are "so distant from the transmission line that they cannot be reasonably deemed to 'interfere or threaten to interfere' with the transmission line rendering the removal inconsistent with the right of way." Amended Formal Complaint, ¶ 10.

6. Complainant wants Duquesne Light to trim the trees as opposed to removing them. Amended Formal Complaint, ¶ 11.

III. LAW AND ARGUMENT

7. The Commission lacks jurisdiction to adjudicate the issues presented in the Amended Formal Complaint because they relate exclusively to the scope and validity of Duquesne Light's claimed right of way over the Property.² Simply put, it is now Complainant's position that Duquesne Light's planned vegetation maintenance action is not permitted by its right of way agreement and, therefore, is impermissible. Amended Formal Complaint, ¶¶ 8, 10. That is the only basis Complainant -- who is now represented by counsel -- relies upon as a basis for the relief requested. In other words, Complainant asks this Commission to rule that

² 52 Pa. Code § 5.101(a)(1) allows a party to file preliminary objections due to "lack of commission jurisdiction."

the removal of the trees in question is beyond the scope of the right of way agreement. The Commission, however, lacks jurisdiction to do so.

8. In Fairview Water Co. v. Pa. Pub. Util. Comm'n., 502 A.2d 162 (Pa. 1985), the Pennsylvania Supreme Court explicitly held that the Commission does not have jurisdiction to determine the scope and validity of an easement. Following the Supreme Court's precedent, the Commission has repeatedly determined that it is not the proper forum for resolving property rights controversies because those matters must be decided by courts of general jurisdiction. See, e.g., Perrige v. Met. Ed. Co., Docket No. C-00004110, 2003 WL 21916400 (Pa. P.U.C. July 10, 2003); Milliard v. Nat'l Fuel Gas Dist. Corp., Docket No. C-2013-2398065, 2014 WL 466622, at *4 (Pa. P.U.C. Jan. 24, 2014) (Salapa, ALJ) ("The Commission has no jurisdiction to adjudicate real property issues such as the scope of the Respondent's easements **and what activities the Respondent can engage in within its right of way, pursuant to its right of way agreements**. Such a determination is solely within the jurisdiction of the courts of the Commonwealth.") (emphasis added).

9. In Boczar v. PPL Elec. Utilities Corp., Docket No. C-20016332, 2003 WL 1738952 (Pa. P.U.C. Feb. 6, 2003), the complainant alleged that the utility was not authorized to place its poles, transformers, and cable lines on his property. The Commission stated that since the utility company produced right of way agreements for the facilities in question (and it is undisputed that Duquesne Light has such an agreement here, Amended Formal Complaint, ¶¶ 5-6), it was without jurisdiction to determine property rights concerning those easements. Similarly, in Amati v. West Penn Power Co., Docket No. C-00945842 (Order entered on Oct. 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. See also, Fiorillo v. PECO Energy Co., Docket No. C-00971088, 1999 WL 33592799 (finding that complainant's assertion that a power line was not properly on her property "must be pursued as a civil action in trespass and/or ejectment" because those

“issues deal with the proper use of real property” which is “within the exclusive jurisdiction of the courts of common pleas of this Commonwealth.”).

10. While Complainant challenges Duquesne Light’s right of way agreement as being vague and unrecorded, it admits that the agreement exists and that Duquesne Light relies on it as the basis for its proposed vegetation maintenance actions. Amended Formal Complaint, ¶¶ 4, 8, 10. The undisputed fact that Duquesne Light does have a right of way agreement upon which it relies -- regardless of whether Complainant disputes the validity or scope of that agreement -- deprives the Commission of jurisdiction in this matter.

11. The Commission’s decision in Stavnicky v. PPL Utilities, Inc., Docket No. C-20043368, 2005 WL 1651882 (Pa. P.U.C. May 23, 2005) (Melillo, ALJ) (Final Order entered on July 13, 2005), illustrates that point. In that case, the complainant alleged that PPL was not authorized to place a pole and associated facilities on his property and requested that the Commission order that those facilities be removed. Id. at *1. In response, PPL produced written documentation of an easement relating to the complainant’s property and argued that the Commission lacked jurisdiction to determine the validity of that easement. The presiding ALJ agreed, holding: “Accordingly, I conclude that subject matter jurisdiction in right-of-way disputes extends only to cases wherein there is no written documentation of an easement. **If PPL produces a document purporting to show a grant of authority for a right-of-way concerning Complainant’s property, then the Commission’s inquiry should be at an end.**” Id. at *11 (emphasis added).³

12. A similar result was recently reached in Vale Vista Associates, LP v. West Penn Power Co., Docket No. C-2015-2517345, 2016 WL 826759 (Pa. P.U.C. Feb. 16, 2016) (Salapa, ALJ) (Final Order entered on March 29, 2016). There, the presiding ALJ granted preliminary objections based on lack of jurisdiction where the complaint related to the utility’s attempt to

³ Duquesne Light has already produced its right of way agreement in this case. See Exhibits A and B to Duquesne Light’s Answer and New Matter.

remove trees from the complainant's property pursuant to a written easement agreement. Following the holding of Stavnicky, the ALJ held:

Accepting as true all the facts alleged in the complaint, the Complainants are not entitled to relief as a matter of law. The dispute alleged in the complaint is whether the Respondent may remove trees from its easement pursuant to its easement agreements. Since the parties have produced easement agreements, the Commission's decision in Stavnicky requires that the Commission dismiss the Complainant's complaint.

As set forth above, the Commission lacks subject matter jurisdiction to adjudicate real property disputes, including the scope and validity of easements. Since the Commission's jurisdiction does not extend to adjudicating real property disputes, I will sustain the preliminary objections. . . .

Id. at *7 (emphasis added).

13. The Commission's decision in Tomb v. Penn. Electric Co., Docket No. C-2008-2036378, 2008 WL 5786615 (Pa. P.U.C. Dec. 4, 2008), is particularly instructive. In that case, the complainant requested that the Commission order Penelec to cease and desist cutting down trees on her property on the grounds that the trees fell outside of Penelec's right of way. Id. at *1. The complainant argued that Penelec's "unauthenticated 1921 company document, which is neither notarized nor recorded in the county courthouse as part of any land deed is not valid...." Id. (internal quotations omitted). Penelec filed preliminary objections arguing that the Commission lacked subject matter jurisdiction over the dispute. The presiding ALJ granted the preliminary objections and the Commission affirmed because the "Commission lacks subject matter jurisdiction to determine the scope and validity of the instant easement." Id. at *2.⁴ As relevant to the instant dispute, the Commission stated:

The Complainant next asserts that her Complaint challenged the existence, as opposed to the validity, of an easement which would allow Penelec a 100-foot right-of-way. Exc. at 2. **We note that the Complaint acknowledged the existence of an easement recorded in 1945. Complaint at 2. Penelec also**

⁴ The Commission "has only those duties, powers and responsibilities as were expressly or by necessary implication given to it by the Legislature." Id. "Jurisdiction may not be conferred by the parties where none exists." Id.

produced a copy of an easement. Penelec Preliminary Objections, Exh. 3. As such, it is clear that the instant controversy is not regarding the existence of the easement, it is about the scope of the easement. This Commission is not the proper forum to resolve a controversy which will determine property rights, that is a matter for a court of general jurisdiction. See *Anne E. Perrige v. Metropolitan Edison Co.*, Docket No. C-00004110 (July 11, 2003)(holding that, in a dispute regarding the location of a right-of-way, the Commission had no jurisdiction to interpret the meaning of the written right-of-way). See also *Fiorillo v. PECO Energy Co.*, Docket No. C-00971088 (September 15, 1999) (citing *Lou Amati/Amati Service Station v. West Penn Power Co. and Bell-Atlantic-Pennsylvania, Inc.*, Docket No. C-00945842 (October 25, 1995) where the Commission stated that real property issues such as trespass and whether or not utility facilities are located pursuant to valid easements or rights-of-way are within the exclusive jurisdiction of the Courts of Common Pleas of the Commonwealth). *Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, slip op. at 6-7 (May 28, 2008). Accordingly, the Complainant's Exception on this issue is denied.

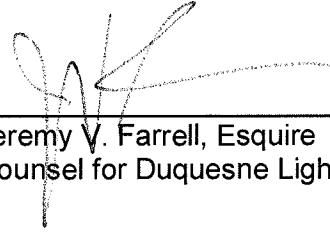
Id. at *3 (emphasis added; internal quotation omitted).

14. The instant case presents the same issues as Stavnicky, Vale Vista, and Tomb. Complainant is challenging Duquesne Light's right to take certain actions on his property. Duquesne Light has a written right of way agreement that it asserts grants the company the right to take the actions challenged in the Amended Formal Complaint. Like the complainant in Tomb, Complainant acknowledges the existence of Duquesne Light's written documentation of the right of way. Amended Formal Complaint, ¶¶ 4-5. Therefore, this matter clearly involves questions as to the scope and validity of that easement agreement and not about the existence of an easement. The Commission lacks the jurisdiction to hear such a dispute.

15. Since the Commission lacks jurisdiction to resolve the issues involved in the Amended Formal Complaint, this action must be dismissed in its entirety pursuant to 52 Pa. Code § 5.101(a)(1).

WHEREFORE, Duquesne Light Company respectfully requests that the Commission sustain its Preliminary Objections and dismiss the Complaint with prejudice to the extent that it seeks recovery of monetary damages.

TUCKER ARENSBERG, P.C.

A handwritten signature in black ink, appearing to read 'J. Farrell', is written over a solid horizontal line.

Jeremy V. Farrell, Esquire
Counsel for Duquesne Light Company

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