

July 11, 2017

Via Electronic Filing

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

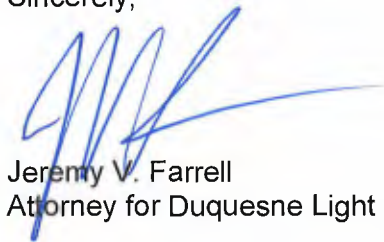
RE: Robert Kuhn, Jr. v. Duquesne Light Company
Docket No. C-2017-2610584

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Preliminary Objections to the Formal Complaint filed by Robert Kuhn.

A copy of this document has been served upon Complainant in accordance with Commission regulations. Please feel free to contact me if you have any questions.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Paul Shane Miller
Attorney for Duquesne Light Company

Enclosure

cc: Robert Kuhn (with enclosure)

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3. Complainant's demand for monetary damages and that Duquesne Light commission a third party environmental assessment is also improper because the Commission is not empowered to award such relief.

4. To the extent that Complainant seeks to prosecute the interests of the general public by asking that Duquesne Light be forced to undertake an environmental assessment, he lacks the standing to do so.

II. THE COMPLAINT'S ALLEGATIONS

5. Duquesne Light operates a transmission circuit that runs through Complainant's property. Formal Complaint Document, pp. 1-2.

6. Complainant acknowledges that Duquesne Light relies upon a right of way agreement that permits it to trim or remove any trees or shrubbery which threaten to interfere with the transmission system. Formal Complaint Document, p. 1.

7. Complainant takes issue with vegetation management activity that Duquesne Light has proposed to undertake on Complainant's property, asserting that Duquesne Light's proposed actions are not permitted by the subject right of way agreement. Formal Complaint Document, p. 1. For example, Complainant alleges that "DLC intends to increase the width of the established right-of-way (ROW) running across my property by an estimated 40 feet on each side." *Id.* Complainant also contends that Duquesne Light's right of way is only 32.5 feet wide even though there is no defined width specified in the right of way agreement attached to the Complaint as Exhibit 3. *Id.* He contends that Duquesne Light is planning to remove trees outside of the surveyed easement. Formal Complaint Document, p. 3.

8. Complainant seeks monetary damages for the trees that Duquesne Light plans to remove on his property. *Id.*

9. Furthermore, "[i]n the interests of public safety," and in light of prior flooding in the Shaler area, Complainant also asks that this Commission order Duquesne Light to "have an

independent 3rd party conduct an environmental assessment on the affects of DLC's removal initiative including a flood analysis and recommendations for minimizing environmental impacts."

Formal Complaint Document, p. 3.

III. LAW AND ARGUMENT

A. The Commission lacks jurisdiction to adjudicate this property rights dispute.

10. The Commission lacks jurisdiction to adjudicate the issues presented in the Formal Complaint because they relate exclusively to the scope of validity of Duquesne Light's claimed right of way over the Property.¹ Simply put, it is Complainant's position that Duquesne Light's planned vegetation maintenance action is not permitted by its right of way agreement and, therefore, is impermissible. Formal Complaint Document, pp. 1-3. Complainant asks this Commission to rule that 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.

11. 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**

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

way agreements. Such a determination is solely within the jurisdiction of the courts of the Commonwealth.”) (emphasis added).

12. 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), 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 ejection” 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.”).

13. While Complainant challenges Duquesne Light’s right of way agreement as being ambiguous, he admits that the agreement exists and that Duquesne Light relies on it as the basis for its proposed vegetation maintenance actions. Formal Complaint Document, pp. 1-3. 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.

14. 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).²

15. 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 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).

16. 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,

² Duquesne Light has already produced its right of way agreement in this case. See Exhibit A to Duquesne Light's Answer and New Matter.

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 *2.³ 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 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-000041110 (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).

³ 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.

17. 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 claims grants the company the right to take the actions challenged in the Complaint. Like the Complainant in Tomb, Complainant acknowledges the existence of Duquesne Light's written documentation of the right of way. Formal Complaint, pp. 1-3. 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.

18. 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).

B. The Commission may not award monetary damages or order Duquesne Light to commission a third party environmental assessment.

19. Pursuant to 52 Pa. Code. § 5.101(a)(1), a party may file preliminary objections on the grounds of “[l]ack of Commission jurisdiction.”

20. Duquesne Light files these Preliminary Objections because the Commission lacks jurisdiction over the Complaint's requested relief to the extent that it requests monetary damages or an order requiring Duquesne Light to commission an environmental assessment.

21. “The Commission must act within, and cannot exceed, its jurisdiction.” City of Pittsburgh v. Pa. Public Utility Comm'n, 43 A.2d 348 (Pa. Super. Ct. 1945).

22. The Commission lacks jurisdiction to award damages or to litigate a private action for damages on behalf of a Complainant. Poorbaugh v. Pa. Public Utility Comm'n, 666 A.2d 744 (Pa. Cmwlth. 1995). Similarly, the Commission lacks jurisdiction over Complainant's request that Duquesne Light obtain an independent, third party environmental assessment. See, e.g., Sarah Bernardi, C-2014-2453852, 2016 WL 2732238, at *5 (May 5, 2016) (noting that

the Commission would not consider environmental issues posed by complainant's challenge to utility's use of herbicide that are within the Department of Environmental Protection's jurisdiction); Jurisdictional & Pipeline Safety Issues Related to the Marcellus Shale, I-2010-2163461, 2010 WL 1711092, at *1 (Mar. 11, 2010) ("We do not intend to examine issues outside of this Commission's jurisdiction, such as water quality and other environmental issues.")

23. Accordingly, the Commission lacks the jurisdiction to award the monetary damages and environmental assessment sought in the Complaint. For these reasons, the Complaint should be dismissed to the extent that it seeks such relief.

C. Complainant lacks standing to prosecute claims on behalf of the general public.

24. Duquesne Light makes its third preliminary objection pursuant to 52 Pa. Code. § 5.101(a)(7), which permits a party to file preliminary objections to dismiss a pleading for lack of standing.

25. "Generally, the Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding." Pamela Giacomel Luke v. Columbia Gas of Pennsylvania, Docket No. C-2014-2425948, 2014 WL 3824555, *5 (Pa. P.U.C., July 18, 2014).

26. "The Complainant's interest in the subject matter of the proceeding is direct if her interest is adversely affected by the actions challenged in the complaint, is immediate if there is a causal nexus between her asserted injury and the actions challenged in the complaint and is substantial if she has a discernible interest other than the general interest of all citizens in seeking compliance with the law." Luke, 2014 WLC 3824555 at *5 (citing Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996)).⁴ A party who asserts standing "in a representational

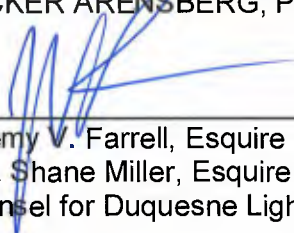
⁴ Standing is an important concept. As one Administrative Law Judge aptly noted: "Requiring a person or entity to have a direct, immediate and substantial interest in the subject matter of a proceeding

capacity would still be required to demonstrate an interest on the part of its members that is direct, immediate and substantial.” Pennsylvania Pub. Utility Comm'n v. Pennsylvania Gas & Water Company, et al., R-922169, 1992 WL 687130, at *3 (Oct. 29, 1992).

27. Here, Complainant asks this Commission to order Duquesne Light to obtain a third party environmental assessment of its proposed vegetation management, citing the “interest of public safety” and prior flooding problems that the Shaler area experienced in 1986 and 2004. Formal Complaint Document, p. 3. Complainant, however, lacks a substantial interest in such matters as his interest is no different than the general interest of all citizens in the area. As a result, those portions of the Complaint should be dismissed.

WHEREFORE, Duquesne Light Company respectfully requests that the Commission sustain its Preliminary Objections and dismiss the Complaint with prejudice in its entirety.

TUCKER ARENSBERG, P.C.



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helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers.” Luke, supra at *5.

