

July 17, 2017

Via Electronic Filing

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

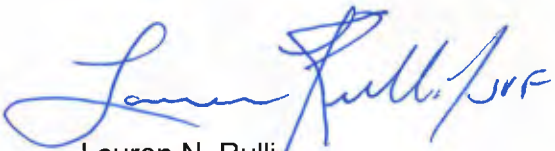
RE: Simler Creig Batcheler v. Duquesne Light Company
Docket No. C-2017-2609480

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Preliminary Objections to the Formal Complaint filed by Simler Creig Batcheler.

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,



Lauren N. Rulli
Attorney for Duquesne Light Company

Paul Shane Miller
Attorney for Duquesne Light Company

Enclosure

cc: Simler Creig Batcheler (with enclosure)

LIT:625884-1 014657-158498

4. 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. 3.

5. Complainant takes issue with the vegetation management activity that Duquesne Light has proposed to undertake on Complainant's property on the grounds that Duquesne Light's proposed actions are not permitted by the subject right of way agreement. Formal Complaint Document, p. 3. He contends that Duquesne Light is attempting to expand the boundaries of the right of way agreement. Id. For example, Complainant alleges that "It is Duquesne Light's intention to increase the width of the established right of way running across our properties by an estimated 40 feet on either side of the existing right of way." Id. He contends that Duquesne Light is planning to remove "over 40 mature trees" that he alleges are outside of the existing right of way. Id.

III. LAW AND ARGUMENT

6. The Commission lacks jurisdiction to adjudicate the issues presented in the Formal Complaint because they relate exclusively to the scope and validity of Duquesne Light's 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, p. 3. Complainant asks this Commission to "stop them [Duquesne Light] from increasing the width of the right of way" and to prevent the company from removing trees that are allegedly beyond the existing right of way. Id. The Commission, however, lacks jurisdiction to do so.

7. 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,

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

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).

8. 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 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.”).

9. While Complainant challenges the boundaries and dimensions of Duquesne Light’s right of way, 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. 2-

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.

10. 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 this 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

11. 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

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.

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).

12. 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 *2.³ 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-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-**

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.

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.

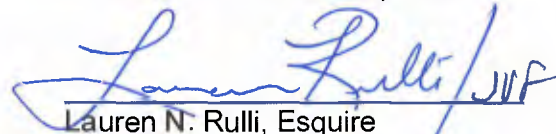
Id. at *3 (emphasis added; internal quotation omitted).

13. 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. 2-3. 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.

14. Since the Commission lacks jurisdiction to resolve the issues involved in the 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 in its entirety.

TUCKER ARENSBERG, P.C.

A handwritten signature in blue ink, appearing to read "Lauren Rulli", with a horizontal line underneath it.

Lauren N. Rulli, Esquire
Paul Shane Miller, Esquire
Counsel for Duquesne Light Company

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

SIMLER CREIG BATCHELER,

Complainant,

vs.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2017-2609480

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the participant listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

Simler Creig Batcheler
3707 Aurelia Drive
Allison Park, PA 15101

Dated this 17th day of July, 2017

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