

July 31, 2017

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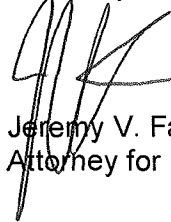
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
2nd Floor, Room-N201
Harrisburg , PA 17120

**RE: Andrew Tomko v. Duquesne Light Company
Docket No. C-2016-2577571**

Dear Secretary Chiavetta:

Enclosed please find Duquesne Light Company's Motion for Judgment on the Pleadings. A copy of this document has been served upon Complainant in accordance with Commission regulations.

Sincerely,



Jeremy V. Farrell
Attorney for Duquesne Light Company

Enclosure

cc: Andrew Tomko (with enclosure)
ALJ Andrew Calvelli (with enclosure)

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3. The Complaint alleges that the Borough -- and not Complainant -- asked Duquesne Light to install a street light at that location because the Borough allegedly determined that the absence of a street light at that location was a safety hazard. Complaint, ¶

4.

4. Complainant does not contend that he is a duly authorized, appointed, or elected official of the Borough or that he has the authority to bind the Borough and its constituents in this matter.¹

5. Complainant did not join the Borough in this action. Complainant nevertheless tries to compel the Borough to reimburse Duquesne Light for the expenses incurred to install the street light he requests. Complaint, ¶¶ 4-5.

6. On December 20, 2016, Duquesne Light filed an Answer and New Matter to Formal Complaint, as well as Preliminary Objections. Duquesne Light's Preliminary Objections were based on three grounds: (1) that Complainant failed to join the Borough, which is a necessary and indispensable party, to this action; (2) that Complainant lacked standing to pursue the claims asserted in the Complaint; and (3) that the Complaint violated Commission regulations to the extent that Complainant, a non-attorney, purported to prosecute the interests of others living in his neighborhood.

7. Complainant did not file a response to Duquesne Light's Answer and New Matter or Preliminary Objections. By failing to respond to the New Matter, Complainant has admitted to the allegations contained therein. See 52 Pa. Code § 5.63(b) ("Failure to file a timely reply to new matter may be deemed in default, and relevant facts stated in the new matter may be deemed to be admitted"); Stefanowicz v. Pennsylvania-American Water Co., C-20078165, 2008 WL 8014613, at *4 (Pa. P.U.C. May 22, 2008) ("The Commission's Regulations clearly provide

¹ In fact, as discussed in Paragraph 9 below, the Pennsylvania Public Utility Commission determined that Complainant did not have the authority to represent other residents in his community or the Borough in this proceeding. See Tomko v. Duquesne Light Co., Docket No. C-2016-2577571, at *7 (Pa. P.U.C. July 20, 2017).

that failure to respond to affirmative allegations in New Matter may cause those allegations to be deemed admitted.”). As such, Duquesne Light respectfully requests that the Commission deem the allegations in its New Matter admitted.

8. On April 7, 2017, the presiding Administrative Law Judge (“ALJ”) issued an Initial Decision that sustained Duquesne Light’s Preliminary Objections and dismissed the Complaint. See Tomko v. Duquesne Light Co., Docket No. C-2016-2577571, 2017 WL 1739473, at *1 (Apr. 7, 2017). The ALJ found that Complainant lacked standing to pursue this claim and that Complainant also lacked the legal authority to bring the Complaint on behalf of other residents of the Borough. Id. The ALJ dismissed the Complaint in its entirety on those grounds and did not address Duquesne Light’s remaining argument that the Complaint should be dismissed because Complainant had failed to join a necessary and indispensable party. Id. at *6 (“Since I am ruling in favor of the Respondent on those issues [lack of standing and lack of legal authority to act on behalf of others], it is unnecessary for me to discuss the Respondent’s remaining Preliminary Objection alleging the failure to join Plum Borough as an indispensable party to this proceeding . . .”).

9. No exceptions were filed to the Initial Decision, but the Pennsylvania Public Utility Commission (“PUC”) conducted a review pursuant to Section 332(h) of the Public Utility Code. See 66 Pa. C.S. § 332(h); Tomko v. Duquesne Light Co., Docket No. C-2016-2577571, at *1-2 (Pa. P.U.C. July 20, 2017). The PUC affirmed the Initial Decision’s finding that Complainant lacked the authority to represent other residents in his community or the Borough in this proceeding. Id. at *7. The PUC, however, found that the standing issue presented a fact question and remanded the case. Id.

10. Because the PUC found that Complainant lacked the authority to represent others in this proceeding, it did not address whether the Borough was a necessary and indispensable party and expressly stated that the remanded proceedings must involve “the

additional remaining issue of whether Plum Borough is an indispensable party, and if so, the opportunity to join it as such.” Id. at *8.

11. A party may move for judgment on the pleadings “after the pleadings are closed, but within a time so that the hearing is not delayed.” 52 Pa. Code § 5.102(a). The parties received the PUC’s decision on July 20, 2017. They received a telephonic hearing notice on July 26, 2017. The hearing is scheduled for September 7, 2017, which is approximately 40 days away. Accordingly, this Motion for Judgment on the Pleadings will not delay the hearing in this matter.

III. LAW AND ARGUMENT

The Formal Complaint must be dismissed because Complainant has failed to join a necessary and indispensable party.

12. Duquesne Light brings this Motion for Judgment on the Pleadings under 52 Pa. Code § 5.102. Under this provision, a motion for judgment on the pleadings must be granted if the pleadings are closed and “there is no genuine issue as to a material fact and . . . the moving party is entitled to judgment as a matter of law.”² 52 Pa. Code § 5.102(d)(1).

13. As noted in more detail below, the absence of a necessary and indispensable party defeats a forum’s subject matter jurisdiction, so the question of whether the Borough is a necessary and indispensable party is a threshold inquiry that is potentially dispositive of this action. If it is determined that the Borough is an indispensable party, then the remaining issues, *i.e.* Complainant’s standing to bring this action and the merits of the Complaint, are mooted.

14. A party is considered indispensable to a legal proceeding “when its rights are so connected with the claims of the litigants that no decree can be made without impairing its

² The pleadings are closed in this case. Complainant filed the Complaint on November 16, 2016. On December 20, 2016, Duquesne Light filed its Answer and New Matter. The 20-day time period for Complainant to respond to Duquesne Light’s New Matter has expired. See 52 Pa. Code § 5.63(a) (“Unless otherwise ordered by the Commission, replies to . . . [a] new matter shall be filed with the Commission and served within 20 days after the date of service of the answer . . .”).

rights, and it must be made a party to protect such rights.” Grimme Combustion, Inc. v. Mergentine Corp., 595 A. 2d 77, 81 (Pa. Super. 1991). A necessary party is one “whose presence, while not indispensable, is essential if the court is to resolve completely a controversy and to render complete relief.” Pa. Human Relations Comm’n v. School Dist. of Phila., 651 A. 2d 177, 184 (Pa. Cmwlth. 1993). The inquiry into whether a party is indispensable is made from the perspective of protecting the rights of the absent party, not from the view of whether the joinder or nonjoinder of a party would make the matter more difficult to litigate. Grimme, 595 A. 2d at 81.

15. The failure to join an indispensable party is crucial because it impacts subject matter jurisdiction. Polydyne, Inc. v. City of Phila., 795 A. 2d 495, 496 (Pa. Commw. 2002); Bridgeport Garage, Inc. v. Pennsylvania-American Water Co., F-2008-2037352, 2009 WL 1515009, at *2 (Pa. P.U.C. May 20, 2009). Subject matter jurisdiction involves the competency of a forum to hear and decide the controversy before it and can be raised by any party at any stage of the litigation, including in a motion for judgment on the pleadings. Cobbs v. SEPTA, 985 A. 2d 249, 254-55 (Pa. Super. 2009). If an indispensable party is not joined, the forum is without jurisdiction to decide the matter. Fiore v. Oakwood Plaza Shopping Center, 585 A. 2d 1012, 1020 (Pa. Super. 1991). Pennsylvania courts have routinely dismissed complaints where a plaintiff has failed to join a necessary and indispensable party. See Damico v. Royal Ins. Co., 556 A. 2d 886, 888 (Pa. Super. 1989) (affirming dismissal of complaint against insurance company after auto accident due to plaintiff’s failure to join a necessary and indispensable party); Zurenda v. Com., 405 A. 2d 1124, 1127-28 (Pa. Cmwlth. 1979) (sustaining preliminary objections and affirming dismissal of complaint for failure to join an indispensable party).

16. Pennsylvania courts consider four factors in assessing whether a party is necessary and indispensable to an action:

- (a) Do absent parties have a right or an interest related to the claim?
- (b) If so, what is the nature of that right or interest?
- (c) Is that right or interest essential to the merits of the issue?

(d) Can justice be afforded without violating the due process rights of absent parties?

Martin v. Rite Aid of Pa., Inc., 80 A. 3d 813, 814 (Pa. Super. 2013).

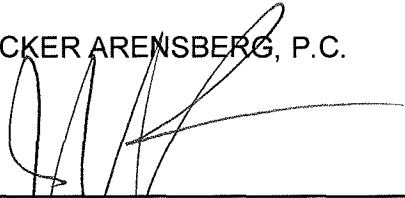
17. Here, the Borough qualifies as both a necessary and indispensable party under the factors listed above. First, the Borough has a right or interest related to this claim because it would be required to pay for the service consumed by the street light that Complainant requests in the Complaint and/or it will be required to pay Duquesne Light for the equipment and labor to install the street light. See Complaint, ¶ 4 (“Plum Boro [sic] will fully reimburse Duquesne Light for their expenditures for the installation of the URD street light.”); Answer and New Matter to Formal Complaint, ¶ 4 (“[T]his complaint was filed by an individual who . . . does not allege he is a duly elected, appointed, or authorized agent or attorney acting on behalf of Plum Borough (which would be the entity forced to pay for the service consumed by the street light requested in the Complaint...). Second, for the same reasons, the nature of the Borough’s interest in this case qualifies as a property right and interest. Third, the Borough’s property rights and interests are essential to the merits of this action because they go to the heart of the relief that Complainant is seeking. He specifically requests an order requiring Duquesne Light to “install an underground residential street light (URD) on Willow Village Drive near Saltsburg Road” (Complaint, ¶ 5) and represents that “Plum Boro [sic] will fully reimburse Duquesne Light for their expenditures for the installation of the URD street light.” Complaint, ¶ 4. Further, once the street light is installed, the Borough -- not Complaint -- would be required to pay Duquesne Light for the service. See Answer and New Matter to Formal Complaint, ¶ 4 (“[T]his complaint was filed by an individual who . . . does not allege he is a duly elected, appointed, or authorized agent or attorney acting on behalf of Plum Borough (which would be the entity forced to pay for the service consumed by the street light requested in the Complaint...). The Borough’s property rights and interests thus are directly affected by Complainant’s claims as Complainant is attempting to obligate the Borough to pay for the installation and use of a new street light. Finally, justice cannot be afforded without violating the Borough’s due process rights because if

Complainant receives the relief he seeks, the Borough would be compelled to pay Duquesne Light for the installation of the street light and all subsequent payments for its operation, which could continue for years. The Borough cannot be bound by Complainant's promises without having the opportunity to be involved in the proceeding that establishes those obligations.

18. In sum, this Formal Complaint must be dismissed pursuant to 52 Pa. Code § 5.102 because Complainant has failed to join a necessary and indispensable party to this action. Duquesne Light is entitled to judgment as a matter of law.

WHEREFORE, Respondent Duquesne Light Company respectfully requests that the Commission sustain its Motion for Judgment on the Pleadings and dismiss the Complaint with prejudice.

TUCKER ARENSBERG, P.C.



Jeremy V. Farrell, Esquire
Counsel for Duquesne Light Company

