

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

LAURA ANDRACCHIO JOHNSON, and
CHARLES JOHNSON,

Complainants,

v.

DUQUESNE LIGHT COMPANY,

Respondent.

No: C-2022-3032695

**COMPLAINANTS' REPLY TO
DUQUESNE LIGHT COMPANY'S
MEMORANDUM REGARDING ITS
PRELIMINARY OBJECTIONS**

Filed on behalf of Complainants
Laura Andracchio Johnson,
and Charles Johnson

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Complainants Charles Johnson and Laura Andracchio Johnson reply as follows to the November 4, 2020, “Memorandum Regarding Duquesne Light Company’s Preliminary Objections” (“DL Mem.”).

I. Duquesne Light Was Not Furnishing or Maintaining Service When It Failed to Promptly Notify The Sellers Of The Ridgehaven Property or Complainants About The West Deer Routes in Spring 2017

Complainants do not allege that Duquesne Light Company (“Duquesne Light”) “acted improperly in its interactions with the public and customers,” nor do Complainants “raise issues regarding the reasonableness of Duquesne Light’s planning and public communications in connection with a transmission line project.” DL Mem. 5, 6. This is a distortion of Complainants’ allegations in order to fit Duquesne Light’s jurisdiction narrative. Rather, Complainants allege that Duquesne Light acted improperly by failing to promptly notify two private sellers that it had mapped two high voltage line routes through the publicly for sale-listed property they were marketing— which was the only property of over 300 parcels transgressed by two routes-- to the detriment of two private buyers, to-wit, the Complainants. This case has nothing to do with “customers,” or how Duquesne Light interacted with “the public.” DL Mem. at 5. At bottom, this

case is about Duquesne Light's duties to two people who were buying publicly listed real property two months after Duquesne Light finished mapping routes through it.

Duquesne Light's June, 2017, notice to the sellers of the property was *not* provided under the Interim Guidelines for The Filing of Electric Transmission Line Siting Applications, 52 Pa. Code §69.3101-3107. DL Mem. 7. Rather, it was provided for pre-siting outreach, as Duquesne Light has admitted. Preliminary Objections at ¶24 (The June 2017 notice "was issued by Duquesne Light for the purpose of beginning public outreach and education for the West Deer Project."). Pre-siting outreach is not required or regulated by the Public Utility Commission ("PUC" or "Commission"), including under the Interim Guidelines. The Guidelines set forth "information that should be provided *with a transmission siting application* by an electric utility under §57.71-57.76 (relating to Commission review of siting and construction of electric transmission lines)." 52 Pa. Code §69.3101, Scope. Section 69.3102 of the Interim Guidelines, "Public notice filing requirements," also contains no provision requiring pre-siting application outreach or notices. 52 Pa. Code §69.3102. That section requires utilities to provide with their siting applications notices sent under §57.91 relating to disclosure of eminent domain power. Therefore the June 2017 notice to the sellers, which was not a §57.91 eminent domain notice, was not governed by the Interim Guidelines, or any other PUC regulation or rule.

Accordingly, Duquesne Light was not furnishing or maintaining service when it failed to promptly notify the sellers in April or May 2017, or when it belatedly notified the sellers in June 2017. 66 Pa. C.S. §1501. Duquesne Light was also not acting "in the performance of [its] duties... to [its] patrons, employees, other public utilities, and the public" when it first delayed and then later sent the notice. 66 Pa. C.S. §102 (defining "service" as used in §1501).

DiSanto v. Dauphin Consol. Water Supply Co., 436 A.2d 197 (Pa. Super. 1981), cited by Duquesne Light, supports neither PUC jurisdiction of this matter nor Duquesne Light’s argument that it was furnishing “service” to the public in notifying or failing to notify the Ridgehaven sellers. DL Mem. 6. In *DiSanto*, the issue transferred to the PUC was whether a water company could require a developer to use the water company’s approved contractor to install a water main and forty-nine customer service lines, rather than a contractor chosen by the developer. 436 A.2d at 442, 446. The PUC had jurisdiction because the case involved the furnishing of water service and rates. *Id.* at 446-449. The utility’s conduct in *DiSanto* is nothing like Duquesne Light’s conduct here, and the fact that the utility was furnishing service was unquestionable, unlike here.

II. Complainants Do Not Allege That Duquesne Light Violated A PUC Rule Or Regulation In Sending The September 2017 Eminent Domain Notice To Complainants, And Whether It Did Is Irrelevant To This Matter

Complainants have alleged the September 2017 Eminent Domain Notice and request for access as further evidence of the cloud that Duquesne Light placed on the Ridgehaven property, and then intentionally failed to remove when it knew in Spring 2019 that the property was no longer impacted. Complaint at p. 3; Answer at ¶4; Reply to New Matter at ¶22. Duquesne Light’s argument that it was complying with 52 Pa. Code §57.91 when it sent the September 2017 notice is irrelevant (DL Mem. 7): the June, 2017, voluntary, belated notice to the sellers of the Ridgehaven property is the critical event that gave rise to this case, because if the notice had been given promptly, Complainants would not have purchased the property. Duquesne Light was not acting under any rule or regulation when it sent the June, 2017, notice.

III. The PUC Is Not Bound By The Common Pleas Order If It Was Erroneous

Duquesne Light incorrectly argues that the Commission has jurisdiction because the Common Pleas Court so “ruled” in its Order bifurcating the matter, the Superior Court “upheld”

the Order, and the Supreme Court “refused” to overturn the Order. DL Mem. at 2, 6, 8. First, the Common Pleas Court did not expressly rule that the PUC has jurisdiction and made no findings whatsoever to support the Commission’s jurisdiction. Ex. B to Formal Complaint. In fact, the court did not even use the word “jurisdiction” in its Order. *Id.* Second the Superior Court did not “uphold” the Common Pleas Court’s Order. DL Mem. at 2. Rather, the Superior Court denied Complainants’ Ancillary Petition for Review, which they were required to file due to the interlocutory nature of the Common Pleas order. Ex. 1 (March 15, 2021 Order of the Superior Court at 44 WDM 2020). Third, the Supreme Court likewise did not “refuse to overturn” the Common Pleas bifurcation Order. It just did not give Complainants permission to appeal it, which was discretionary because the Order was interlocutory. Ex. 2 (December 21, 2021 Supreme Court Order denying Petition for Allowance of Appeal, no. 211 WAL 2021). Therefore, no Pennsylvania appellate court has ruled on the propriety of the Order bifurcating and transferring to the Commission nor has any held that the Commission has jurisdiction of this matter.

It is therefore incumbent upon the Commission to resolve the question of jurisdiction before proceeding, particularly because there is ample legal authority casting doubt on the Commission’s jurisdiction here.¹ And trial courts are not immune from legal error in determining PUC jurisdiction. See cases at n.1. Indeed, in *Poorbaugh*, the Commonwealth court held that the Common Pleas court had erroneously transferred the case to the PUC, which held hearings and entered a ruling that was then vacated by the Commonwealth Court. 666 A.2d at 751. *Poorbaugh*

¹ See Complainant’s Memorandum Pursuant to the Commission’s October 20, 2022 Interim Order at 10-16. *See also Draftco Corp. v. Nat’l Fuel Gas Distrib. Corp.*, 806 A.2d 9, 16 (Pa. Super. 2002) (Common Pleas court erred in deferring issues to the PUC and in finding that PUC had primary jurisdiction of an injunction claim that did not challenge any PUC rule or regulation); *Poorbaugh v. Pennsylvania PUC*, 666 A.2d 744 (Pa. Cmwlth. 1995) (Common Pleas court erred in finding that PUC had primary jurisdiction of a negligence claim).

is instructive here because the plaintiff claimed he incurred damages due to the utility's negligence in failing to prevent a power surge. *Id.* at 747-748, 750-751. The Commonwealth Court held that while the case was within the subject matter jurisdiction of the Utility Code, it did not require the special expertise of the PUC to resolve it, and therefore the PUC did not have primary jurisdiction and "there was no reason for the trial court to transfer jurisdiction over the matter to the PUC." *Id.* at 748, 750-751. Likewise here, even if subject matter jurisdiction did exist, which it does not, there was no reason for the trial court to transfer the matter to the Commission because it involves straightforward negligence and recklessness claims, removing it from the realm of primary jurisdiction. *See also Draftco*, 806 A.2d at 16 (Superior Court held that Common Pleas court erred in finding primary jurisdiction and deferring issues to the PUC).

IV. Complainants Are Seeking To Refer This Matter Back To Common Pleas, Not To "Withdraw" Their Formal Complaint; and Doing So Does Not Require A §5.94 Public Interest Analysis

Duquesne Light relies heavily on a July 20, 2022 Order entered in *Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network*, Docket No. P-2021-3025296, to support its argument that Complainants should not be permitted to withdraw their Formal Complaint because it would not be in the public interest to do so. DL Mem. 8-11. However, Complainants are not seeking to *withdraw* their Formal Complaint as the Petitioner did in *DRIVE*. Rather, Complainants are seeking to have the matter *referred back* to the Court of Common Pleas by the Commission for lack of jurisdiction. Complainants are therefore not required to make any showing, including a public interest showing, under 52 Pa. Code §5.94.

Even if *DRIVE* had any relevance here, which it does not, the Commission is not compelled by "public interest" to find that it has jurisdiction simply because the Common Pleas Court transferred the matter to the PUC, as discussed in the preceding section. See DL Mem. at 8-9. In

fact, it would be contrary to the public interest for the Commission to resolve the matter if in fact the Common Pleas Court erred and the Commission does not have jurisdiction. Indeed, it was not in the public interest for the Common Pleas court to issue an Order having such profound implications on a litigation, including causing additional years of delay, without supporting the Order with comprehensive factual findings and legal conclusions.

Finally, *DRIVE* is not remotely similar to this case even if it were relevant. Public interest was clearly a concern in that case because the Petitioner sought a Commission declaration that an expanded broadband network infrastructure in several counties was either not subject to, or had complied with, 66 Pa. C.S. § 3014(h), and that the project would not subject it to the Commission’s jurisdiction as a public utility.² *DRIVE* Order at 2. By stark contrast, the Complainants are private citizens complaining of private damages, and their case raises no public interest issues for reasons Complainants set forth in their Memorandum at 15-16, which they incorporate by reference here.³

² The Petitioner, Driving Real Innovation for a Vibrant Economy or “DRIVE,” was “a council of governments created under a formal agreement between the Commissioners of Montour and Columbia Counties under Article 9, Section 5 of the Pennsylvania Constitution and the Pennsylvania Intergovernmental Cooperation Act at 53 Pa. C.S. §§ 2301 et seq., which authorizes local governmental entities to cooperate under joint agreements in fulfilling their governmental functions, including economic development.” *DRIVE* Order at 5.

³ While it is not relevant to the Commission’s determination of jurisdiction, Duquesne Light incorrectly implies that Complainants profited on the sale of the Ridgehaven Property. DL Mem. at 4. Complainants did not make a profit and can support that if ever necessary. As they plead in their Reply to New Matter at ¶17, they in fact paid \$1.3 million for the property. Complainants’ maintenance and improvement costs were far greater than the difference between the purchase and sale prices. Moreover, Complainants have not alleged reduced value of the Ridgehaven property as an item of damage in their case, so the point is not relevant even to the merits. See Second Amended Complaint ¶73 a.-j, listing harms alleged as the basis for damages, none of which is devaluation of the property.

V. Conclusion

For the reasons set forth herein, Complainants respectfully request that the Commission find that it does not have jurisdiction over this matter, refer the case back to the Allegheny County Court of Common Pleas and strike Duquesne Light's Preliminary Objections.

STANLEY M. STEIN PC

A handwritten signature in blue ink that reads "Stanley M. Stein". The signature is written in a cursive style with a horizontal line at the end.

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CERTIFICATE OF SERVICE

I, Stanley M. Stein, Esquire, do hereby certify that true and correct copy of **COMPLAINANTS' REPLY TO DUQUESNE LIGHT COMPANY'S MEMORANDUM REGARDING ITS PRELIMINARY OBJECTIONS** was served on the 16th day of November 2022 upon the following:

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